TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

No. [illegible]

EDWARD L. REED, PLAINTIFF IN ERROR,

vs.

[illegible]

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE [illegible]

[illegible]

SUPREME COURT OF THE UNITED STATES.

No. 229.

EDWARD L. MEAD, PLAINTIFF IN ERROR,

vs.

ANSON BALLARD.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WISCONSIN.

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1 UNITED STATES OF AMERICA,
District of Wisconsin, ss:

At a stated term of the circuit court of the United States of America for the ninth circuit and district of Wisconsin, begun and held according to law on the second Monday of September, A. D. 1866, at the city of Milwaukee, in said district of Wisconsin, present, and presiding, the Hon. Andrew G. Miller, district judge, on the seventh day of the term, to wit, on the seventeenth day of September, A. D. 1866, the following proceedings were had, to wit:

EDWARD L. MEAD
vs. } Ejectment.
ANSON BALLARD.

Be it remembered, that heretofore, to wit, on the second day of April, 1866, the plaintiff, by his attorneys, Messrs. Palmer & Hooker, filed in the office of the clerk of the circuit court of the United States for the district of Wisconsin, his declaration in ejectment, with a notice for an appearance on the part of the defendant on the first Monday of May; also, affidavit showing authority to commence suit, and proof of service of the same on the defendant, as follows, to wit:

Circuit court of the United States of America in and for the district of Wisconsin.

DISTRICT OF WISCONSIN, *ss:*

Of the first Monday of April, 1866, Edward L. Mead, of Manhattan, in the State of Kansas, and who is a citizen of the State of Kansas, plaintiff in this suit, by Palmer and Hooker, his attorneys, complains of Anson Ballard, of Appleton, in the State of Wisconsin, and who is a citizen of the State of Wisconsin, defendant in this suit.

For that the said plaintiff, heretofore, to wit, on the nineteenth day of December, in the year of our Lord one thousand eight hundred and sixty-five, was seized and possessed of all that cer-
2 tain piece or parcel of land situate, lying. and being in the county of Outagamie, and State of Wisconsin, and known and described as block number thirteen, (13,) Appleton plat, in the second ward of the city of Appleton, in said State of Wisconsin, of great value, to wit: twenty-five hundred dollars, wherein and whereto the said plaintiff has, and claims, an estate in fee; and being so possessed thereof, the said defendant afterwards, to wit, on the nineteenth day of December, in the year of our Lord one thousand eight hundred and sixty-five, entered into and ejected the said plaintiff from the said premises, to the possession whereof the said plaintiff is entitled, which said possession the said defendant now unlawfully and unjustly withholds from the said plaintiff, to the damage of the said plaintiff twenty-five hundred dollars; and therefore he brings suit, and asks that the plaintiff do have and recover

of and from the said defendant the possession of said premises, and damages, as aforesaid, together with costs, &c.

PALMER & HOOKER,
Pl'ff's Att'ys.

To Anson Ballard, esq.:

You are hereby notified that the declaration, with a copy whereof you are now herewith served, and to which copy this notice is subjoined, will be filed in the office of the clerk of the circuit court of the United States for the district of Wisconsin, in the city of Milwaukee, on the first Monday of April, A. D. 1866; that upon filing the same, a rule will be entered requiring you to appear and
3 plead to the said declaration on the next rule day of said court, after the filing of said declaration, to wit, on the first Monday of May next; and that if you neglect so to appear and plead, a judgment will be entered against you, and the plaintiff will recover possession of the premises specified in said declaration, together with damages and costs.

PALMER & HOOKER,
Pl'ffs Att'ys.

STATE OF WISCONSIN, *Milwaukee County, ss:*

D. G. Hooker, being duly sworn, says that he is one of the firm of Palmer & Hooker, the plaintiff's attorneys named in the foregoing declaration, and that said attorneys have written authority from said plaintiff, given by his agent and attorney in fact, T. R. Hudd, esq., to commence such action against the defendant named in said declaration.

D. G. HOOKER.

Subscribed and sworn to before me, this 17th day of March, 1866.

MARTIN LARKIN, JR.,
Notary Public, Mil. Co., Wis.

And, at the time of filing said declaration, the plaintiff also filed bond for costs, which was approved; and also entered in the order and rule book an order that the defendant plead to the declaration of the plaintiff on file by the first Monday of May next, or his default would be entered.

4 And afterwards, to wit, on the 18th day of April, A. D. 1866, came the defendant, by his attorney, Mr. Lakin, and filed his plea in the words and figures following, to wit:

Circuit court of the United States for the district of Wisconsin.

ANSON BALLARD, defendant,
ads.
EDWARD L. MEAD, plaintiff.

And the said defendant, by George W. Lakin, his attorney, comes and says that he is not guilty of unlawfully withholding the premises

claimed by the said plaintiff, as alleged in the said declaration of the said plaintiff, and of this the said defendant puts himself upon the country, and the said plaintiff doth the like, &c.

GEORGE W. LAKIN,
Defendant's Attorney.

SEPTEMBER 17, 1866.

This day came the parties, by their counsel, and the issue herein came on to be tried: Whereupon a jury was called to try the same, who came, to wit: Enos McKenzie, Peter Laverse, William P. Merrill, George W. Mygatt, R. B. Rice, A. Marvin, David Carson, Charles H. Hurd, William White, Robert W. Ryckman, Charles McKeever, and M. C. Cook, twelve free, honest, and lawful men of the district, who were severally sworn and empanneled; and the trial of this cause not being concluded, the further hearing was adjourned until to-morrow morning, at nine o'clock.

SEPTEMBER 18, 1866.

This day came the parties, by their counsel, and the trial of this cause was resumed; and, not being concluded, the further hearing was adjourned until to-morrow morning, at nine o'clock.

SEPTEMBER 19, 1866.

This day came the parties, by their counsel, and the trial of this cause was resumed; and the jurors of the jury aforesaid being charged by the court, upon their oaths, respectively, do say that the defendant is not guilty of unlawfully withholding from the plaintiff the possession of the premises described in the declaration.

Whereupon it is considered and adjudged by this court, now here, that the plaintiff take nothing by his said suit, and that the defendant do have and recover of the plaintiff, Edward L. Mead, one hundred and thirty-four dollars and thirty-five cents, his costs about his said defence in this behalf by him expended, and that he have execution therefor.

DECEMBER 29, 1866.

This day came the plaintiff, by his attorneys, and filed a bill of exceptions, duly settled and signed by the court, as follows, to wit:

Circuit court of the United States for the district of Wisconsin.

EDWARD L. MEAD
vs.
ANSON BALLARD.

Be it remembered, that afterwards, to wit, on the seventeenth day of September, A. D. 1866, before the Honorable Andrew G. Miller, judge of the district court of the United States for the district of Wisconsin, presiding, the circuit court of the United States for the seventh circuit, held in and for the district

of Wisconsin aforesaid, comes, as well the said Edward L. Mead, by Palmer & Hooker, his attorneys, as the said Anson Ballard, by George W. Lakin, his attorney, and the jurors of the jury, whereof mention is within made, being called, likewise came, and, after being elected, tried, and sworn to try the several issues within joined, the counsel for the said plaintiff, to prove and sustain the said issue on his part, gave in evidence to the said jury, on his behalf, a patent from the United States of America, dated July 29th, 1846, conveying in due form to John F. Mead, lots number two and three of section number twenty-six, in township number twenty-one north, of range number seventeen east, in the district of lands then subject to entry at the land office at Green Bay, Wisconsin, containing 109 18-100 acres, which patent shewed that the said John F. Mead entered, purchased, and paid for the said tracts of land on the 28th day of March, A. D. 1846. Also, a patent from the United States of America, dated December 14th, 1846, conveying in due form to the said John F. Mead the northeast quarter of the southwest quarter of section number twenty-six, in township number twenty-one north, of range number seventeen east, in the district of lands then subject to entry at the land office at Green Bay, Wisconsin, containing forty acres of land, which patent showed that
7 the said John F. Mead entered, purchased, and paid for the said tract of land on the fifth day of August, 1846.

And thereupon, Thomas R. Hudd was called and sworn as a witness on the part of the plaintiff, and testified as follows: I reside in Appleton, in this State, and have resided there since the year 1853; that was the time I went there. I was acquainted with John F. Mead; he is dead. I am acquainted with the plaintiff, Edward L. Mead; he is the son of John F. Mead. John F. Mead had no other children. Mary F. Mead was the wife of John F. Mead; she is still living, and is married again. She is married to a man named De Viraldi, who was formerly consul to Brazil.

Being cross-examined by the counsel for the defendant, this witness further testified as follows: I have resided in Appleton since January, 1853; I first went there in January, 1849. I afterwards resided at Neenah for some time. John F. Mead died about 1850; I think it was in the month of December; it was about that time. I think it was in the fall of the year; I am not positive as to the precise time, but I am positive as to the circumstance. I was acquainted with him only by reputation; I have seen him once or twice. I know that the plaintiff is the only child of John F. Mead, by being familiar and well acquainted with the family, by the mother's declarations, and a pretty full knowledge of the family affairs. The value of the block number 13, in the city of Appleton, described in the declaration, I should say is five thousand dollars, at least. It was here
8 admitted by the parties that the lands described in the declaration are situated in said lot number two of section number twenty-six, in township number twenty-one north, of range number seventeen east; and that the defendant was in the possession thereof at the time of the commencement of this suit, and still is in the

possession thereof. And thereupon, the plaintiff, by his counsel, rested his case.

Whereupon, the said defendant, by his counsel, did on his behalf give in evidence to the said jury an act of the legislature of the Territory of Wisconsin, entitled "An act to incorporate Lawrence Institute of Wisconsin," passed and approved January 15th, 1847, of which the following is a copy:

An act to incorporate Lawrence Institute of Wisconsin.

Be it enacted by the Council and House of Representatives of the Territory of Wisconsin:

SEC. 1ST. That Rev. Reeder Smith, Henry R. Colman, William H. Sampson, Gov. Henry Dodge, Hon. Mason C. Darling, Hon. Morgan L. Martin, Hon. Nathaniel P. Talmadge, Henry S. Baird, esq., Prof. De Wit C. Vasburg, Jacob L. Bean, esq., William Dutcher, esq., George E. H. Day, esq., and Loyal H. Jones, and their successors, be and they are hereby created a body politic and corporate, to be styled the board of trustees of Lawrence Institute, of Wisconsin, and shall be trustees of said corporation, for the purpose of further establishing, maintaining, and conducting the institution of learning for the education of youth generally, and by the aforesaid cor-
9 porate name to remain in perpetual succession, with full power to sue and be sued, to plead and be impleaded, to acquire, hold, and convey property, real and personal, provided always that the annual income shall not exceed ten thousand dollars; to have and use a common seal; to alter and renew the same at pleasure; to make and alter, from time to time, such by-laws as they may deem necessary for the government of said institution, its officers, and servants: provided such by-laws are not inconsistent with the Constitution and laws of the United States or of this Territory; also to have power to confer on those whom they may deem worthy, all such honors and degrees as are usually conferred in colleges and like institutions in the United States.

Trustees. SEC. 2. There shall be at all times thirteen trustees of said corporation, a majority of whom shall constitute a quorum for the transaction of business. No religious tenets or opinions shall be requisite as a qualification for the office of trustee, except a full belief in divine revelation; nor of any students shall any religious tenet be required to entitle them to all the privileges of the institution; and no particular tenets, distinguishing between the different Christian denominations, shall be required as a qualification for professors in said institution; and no student shall be required to attend religious worship with any specific denomination, except as specified by the student himself, his parents, or guardians. That the said institute shall be located on

No religious test.

Institution, where located. Fox river, between Little Kankalun and the foot
10 of Winnebago lake, at such place as the trustees shall select, and shall be erected on a plan sufficiently extensive to afford ample facilities to perfect the scholar, it being understood that at no time are they required to exceed the means under their control.

Meeting of trustees, where held.

SEC. 4. That the board of trustees shall hold their first meeting at Fond du Lac, within six months after the passage of this act: Provided, a majority should fail of meeting, the minority shall have authority to organize and adjourn to such place and time or times as they may judge proper, to secure a majority of the board, who shall have power to elect a president, two vice presidents, secretary, and treasurer, who shall be termed the executive committee of said board, and have power to execute all business of the corporation committed to them by the by-laws of the institute.

Classification of trustees.

SEC. 5. The board of trustees shall, at their first business meeting, be divided into three classes—four in the first, four in the second, and five in the third. They shall appoint, at their first business meeting, an annual meeting, to be held within one year thereafter, at which time the office of the first class shall expire; and in one year from that time the second class, and the third class in one year therefrom, and the office of one class of trustees to expire annually thereafter in rotation. The board shall have authority to appoint all officers, teachers, and agents of the institution, except the president, who shall be elected by ballot by the annual conference of the Methodist Episcopal Church in Wisconsin, which conference shall elect also annually, by ballot,

Appointment of officers.

11 a visiting committee, consisting of nine, whose duty it shall be to attend all examinations of the institution and look into its condition generally, and report thereon; and at the annual meeting of the board of trustees they shall be ex-officio members, and shall form a joint board with the trustees, who shall have power to fill all vacancies in their board occurring by expiration of office, death, or otherwise.

Special meetings, how called.

SEC. 6. Said board of trustees may meet on their own adjournment, and the president, with the concurrence of two trustees, or any four trustees, may call special meetings of the board, by giving notice to them in writing or otherwise, at least ten days before the time of such meeting; and any trustee may be removed for neglect of duty for more than one year.

Funds—for what purpose applied.

SEC. 7. That the board of trustees shall faithfully apply all funds by them collected or received, according to their best judgment, in erecting suitable buildings, supporting the necessary officers, instructors, and servants; in procuring books and apparatus necessary to the success of the institution: Provided, nevertheless, that in case any donation or bequest be made for particular purposes, which accord with the designs of the institution, the corporation shall receive and accept the same. Every donation or bequest made shall be applied in conformity to the conditions or designs expressed by the donor.

SEC. 8. This act may at any time be altered or amended by the legislature.

WILLIAM SHEW,
Speaker of the House of Representatives.
MASON C. DARLING,
President of the Council.

12 Approved January 15th, 1847. HENRY D. DODGE.

The said defendant, by his counsel, then offered and read in evidence an act of the legislature of the State of Wisconsin, entitled "An act to amend an act entitled 'an act to incorporate the Lawrence Institute, of Wisconsin,'" passed and approved March 21st, 1849, of which the following is a copy, to wit:

An act to amend an act entitled "An act to incorporate the Lawrence Institute, of Wisconsin."

The people of the State of Wisconsin, represented in senate and assembly, do enact, as follows:

Amendment. SEC. 1ST. The act entitled "An act to incorporate the Lawrence Institute of Wisconsin," is hereby amended as follows, viz: The name of said corporation and institution is hereby changed to "The Lawrence University, of Wisconsin." The annual income of said corporation may be sixty thousand dollars, instead of ten thousand dollars, as provided in said act.

Officers, how elected. SEC. 2ND. The board provided by said act shall elect a president of the board, two vice presidents, a treasurer, and secretary, instead of the officers provided by said act; such officers, when elected, shall have all the powers usually given to such officers, and together shall constitute an executive committee, and as such committee shall have power to execute all business of the corporation committed to them by the by-laws of the institution.

13 SEC. 3RD. Said board shall have power to appoint all officers, teachers, and agents of the institution.

Visiting committees. SEC. 4TH. The Wisconsin annual conference of the Methodist Episcopal Church shall annually elect, by ballot, a visiting committee, consisting of nine members, whose duties shall be as provided in said act.

SEC. 5TH. All parts of the act to which this (is) amendatory, conflicting with the provisions of this act, are hereby repealed.

HARRISON C. HOBART,
Speaker of the Assembly.
JOHN E. HOLMES,
Lt. Governor, President of the Senate.

Approved March 21st 1849.

NELSON DEWEY.

The said defendant, by his counsel, then offered and read in evidence, on his part, a deed of conveyance, duly executed, acknowledged, and recorded, of which the following is a copy, excepting the certificate of acknowledgement and recording, viz:

This indenture, made the seventh day of September, in the year of our Lord one thousand eight hundred and forty-seven, between John F. Mead and Mary F. Mead, of Green Bay, Wisconsin Territory, of the first part, and Amos A. Lawrence, of Boston, in the State of Massachusetts, of the second part, witnesseth, that the said

14 party of the first part, for and in consideration of the sum of four hundred and seventy-two dollars and seventy-one cents,

to them in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, have granted, bargained, sold, remised, aliened, and confirmed, and by these presents do grant, bargain, sell, remise, release, and confirm, unto the said party of the second part, and to his heirs and assigns forever, the following described lands in the said Territory, to wit: lots two (2) and three (3), and the northeast quarter of the southwest quarter of section twenty-six (26), in township twenty-one (21) north of range seventeen (17) east, in Green Bay land district, containing, according to the public survey, one hundred and forty nine $\frac{18}{100}$ acres. Said land being conveyed upon the express understanding and condition, that the Lawrence Institute, of Wisconsin, chartered by the legislature of said Territory, shall be permanently located upon said lands, and on failure of such location being made on or before the 7th day of September, 1848, and on repayment of the purchase money, without interest, the said land shall revert to and become the property of the said grantors, except as aforesaid, together with all and singular the hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and all the estate, right, title, interest, claim, and demand whatsoever, of the said parties of the first part, either in law or equity, of, in, and to the above bargained premises, with said hereditaments and appurtenances.

To have and to hold the said premises as above described, with the appurtenances, unto the said party of the second part, and to his heirs and assigns forever.

And the said party of the first part for themselves, their heirs, executors, and administrators, do covenant, grant, bargain, and agree, to and with the said party of the second part, his heirs and assigns, that at the time of the ensealing and delivery of these presents, they are well seized of the premises above conveyed, as of a good, sure, perfect, absolute, and indefeasable estate of inheritance in the law, in fee simple, and that the above-bargained premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all and every person or persons lawfully claiming, or to claim, the whole or any part thereof, they will forever warrant and defend.

In witness whereof, the said parties of the first part have hereunto set their hands and seals, the day and year first above written.

JOHN. F. MEAD. [SEAL.]
MARY F. MEAD. [SEAL.]

Sealed and delivered in presence of
ELIZABETH STEWART. } Except as aforesaid on 21st line interlined be-
JOHN LAST. } fore signature.

Which deed was recorded in the office of the register of deeds of the county in which said lands were situated, on the eighth day of January, 1848.

16 The defendant, by his counsel, then offered in evidence the book containing the record of the proceedings of the board of trustees of the Lawrence Institute, of Wisconsin, for the purpose of showing the organization of the corporation and the preliminary steps in the location of the Lawrence Institute, to which the counsel for the plaintiff objected, although the book offered was admitted by the plaintiff to be the book of records of the Lawrence Institute, of Wisconsin, upon the ground that the same was not a public record, nor the declaration of either party to the suit, but a record of the transactions of a third party, and was incompetent, irrelevant, and immaterial, and the said judge did then and there give his opinion and decide that the said book and the record therein contained, were competent, relevant, and material testimony, and overruled the said objection, and admitted the same in evidence, to which said opinion, and decision of the said judge, the said plaintiff, by his said counsel, did then and there except.

The counsel for the said defendant read in evidence extracts from the said record, of which the following are copies, viz:

[Page 1.]

"The trustees of the Lawrence Institute convened, according to the call of the board, on the 30th day of June, 1847, for the purpose of organizing, according to the act of incorporation for said institute, the following persons being present, viz: Mason C. Darling, Henry R. Coleman, and William H. Sampson. On motion, Mason C. Darling was duly elected president pro tem., and Wm. H. Sampson, secretary.

17 "A quorum of the board not being present, it was unanimously resolved that we adjourn to meet at the office of Hon. M. C. Darling, in Fond-du-Lac, Wisconsin, on Wednesday, the 13th of October next, at 10 o'clock, a. m., or at such earlier period as may be necessary, by order of the president or secretary.

"MASON C. DARLING.
"*Pres. pro tem.*

"W. H. SAMPSON, *Secretary.*"

[Extract read by def't from page two in the proceedings of a meeting held at Fond-du-Lac, Sept. 3d, 1847.

"Resolved, that a committee, to consist of the executive board, the Rev. Reeder Smith, and Geo. E. H. Day, esq., be and they are hereby appointed, with full power to locate the Lawrence Institute at such place within the limits of the charter as they shall deem proper, and that said committee make report to this board of their doing."

[Extract read by the def't from page 3 being one of the by-laws of the board of Trustees.]

"Sec. 2d. The executive committee, in connection with the other committees associated with them, for locating the Lawrence Institute, shall have power to locate said institute in such place as they shall deem proper, not inconsistent with the charter."

[Extract read by def't from page 4.]

"GREEN BAY, *Sept. 7th*, 1847.

"A quorum of the committee appointed to locate the Lawrence Institute of Wiscinsin, convened at the Astor House, when H. S. Baird, esq., was called to the chair, and W. H. Sampson, ap-
18 pointed secretary. After discussing the subject of the location, it was unanimously decided that they were not prepared to locate the place of the institute at present.

"On motion, resolved, that when we adjourn, we adjourn to meet at the call of the secretary.

"On motion, resolved, that each member of this committee be requested to solicit and receive propositions in writing offering inducements to the trustees of the Lawrence Institute for the location at the different places upon which such propositions shall be based, and transmit the same to the secretary of the board."

[Extract read by the def't from page 5.]

"1848, *Aug. 9th.*

"The first annual meeting of the board of trustees of the Lawrence Institute of Wisconsin, convened in the Temperance Hall, in Fond-du-Lac, on the 9th day of August, 1848."

[Extract read by defendant from record of above meeting on page 7.]

"Committee to whom was referred the duty of locating the Lawrence Institute beg leave to report, that they have fixed upon the place on Fox River, called and known by the name of Grand Chute, on section twenty-six (26,) town. twenty-one (21,) range (17) seventeen.

"H. S. BAIRD.
"GEORGE E. H. DAY.
"REEDER SMITH.
"WM. H. SAMPSON."

19 Reeder Smith was then called and sworn, and examined as a witness on the part of the defendant, and testified as follows:

I reside at Appleton; I have resided there since the winter of 1849. I was there before that time. I was there in 1846 and 1847. I called myself at that time thoroughly acquainted with the country in and around where Appleton is now situated. I have heard the record of the proceedings of the board of trustees read in evidence. I was present when the record was made too, or when the proceedings were had. I am the person mentioned there as the Rev. Reeder Smith. I was one of the committee that located the Lawrence Institute of Wisconsin.

Question. Where did you locate it?

(Objected to on the ground that the location must be shown by record evidence, and that the testimony called for by the question was irrelevant, incompetent, and immaterial, and the said judge did then

and there give his opinion and decide that said evidence was relevant, competent, and material, and did overrule the said objection, to which opinion and decision of the said judge, the plaintiff, by his counsel, did then and there except.)

Answer. I went with the other members of the committee to look at lot 2, sec. 26. It was on the 7th of August, 1848, with the surveyor to section 26, town. 21, range 17, and located it at a place called Grand Chute, on the same tract of land that Mr. Mead had deeded to Mr. Lawrence, and that I had paid him the money for. We surveyed a spot of ground upon that tract, denominated a plat afterwards, and known as block (3) three, on which the institution was erected. That was on the Fox River, between Little Kankalan and Winnebago Lake. We located the institution by surveying and staking out the ground. We staked out for the Lawrence University or Institute, the one lot called block No. 3, on the map. The map of the city of Appleton was here read in evidence, a copy of so much of the map as is material to the case is hereto attached and marked Exhibit No. 1. We then made our report to the board of trustees at Fond-du-Lac at the annual meeting. I then made contracts, as I was authorized to do by the board of trustees, with the mechanics for the erection of the building according to the drafts that I hold in my hand, to be built within six months from that time upon that ground. These contracts were in writing. I have them here. The paper I now hold in my hand is the original contract. I saw it signed, and the papers shown me are the original drafts of the building, to which the contract refers. I purchased at this time 166,000 feet of lumber at Duck Creek, and paid for it, and contracted with Mr. Rockfellow to open a road from Duck Creek, twenty miles, to Appleton, and deliver the lumber upon the ground, all of which was fulfilled, and the institution in complete operation for instruction in Nov., 1849. These buildings were burned down, January 4th, 1857. The next agent that succeeded me, purchased other buildings upon block number two (two), in lot number two (2), sec. 26, range 17, government survey, and added thereto others, to make as near as possible the amount of room occupied before, and those were occupied for the institution, as a substitute for the one that was burned down, to this day. That lot was described upon the plat as lots six, eight, and nine, in block two.

Question. Do you know whether or not the institute or university has occupied the premises last described since the burning of the buildings originally erected?

(Objected to by the plaintiff's counsel as incompetent, irrelevant, and immaterial; and the said judge did then and there give his opinion, and decide that the said question was competent, relevant, and material, and overrule said objection, and to which opinion and decision, the said plaintiff, by his counsel, did then and there except.)

Answer. They have graduated students and transacted their business there. It has been in operation there ever since I was a member of the board of trustees of that institution. I have not occupied

the office of trustee since 1849; since then I have been the agent of the institution. The steward and treasurer have been upon this tract of land that I have described, and it is the place where the books are kept and the business done There has been another building erected on the opposite side of the ravine, upon the same tract described upon the map of Appleton, as the university grounds, embracing a part of lot one, as shown on the map. Lot one is part of a tract of land given in trust to the College Associa-
22 tion. I was acquainted with John F. Mead. The university part of the institution was on block 2, of the plat, and lot two of of the government survey, adjoining the one on which it stood when it was burned, and the steward and treasurer had their offices there, and transacted their business there, and the recitations of classes have been continued in that building until now. I know that by calling on Prof. Phinney, who hears recitations and lives there in the building, and who has been professor there most of the time since the institution commenced, or in some way connected with the college. I know the steward and treasurer transact business there, because I have been there and seen it. I know the treasurer transacts part of his business there, because I have called at his office and looked at his books and seen him do business. They have such an officer in the institution as auditor. He audits the accounts. I live in Appleton, on the same street, and three blocks west of the institution, and have lived there since the winter of 1849.

The defendant, by his counsel, then offered and read in evidence the contract, a copy of which is hereto annexed, and marked Exhibit No. 2.

Question. Was the building specified in the contract actually erected?

Answer. There was a modification and change of plan; except the modification which changed the building to one with four gables. They were erected and varied according to the variation upon the back of the contract. The first story of the building was of stone, the balance of wood. The building was substantial and well
23 constructed and well finished. It was painted and all finished according to the contract, and cost about $8,000. While agent for the institution, I was also agent for Mr. Lawrence to erect a dam, and have a mill started in town. I contracted for a mill dam; built a mill, and leased out sixty-five lots for actual location and residences before Mr. Mead's death. I often saw Mr. Mead. I knew him well at Appleton and Green Bay. Mead knew of the erection of these buildings. I was the agent of the Lawrence University at that time.

The defendant then offered and read in evidence the contract between Amos A. Lawrence and the Lawrence Institute, dated November 21, 1848, a copy of which is hereto annexed, and marked Exhibit No. 3; also a deed from Amos A. Lawrence to the Lawrence Institute, dated November 25th, 1850, a copy of which is hereto annexed, marked Exhibit No. 4.

Witness continued: some of the land described in the deed from

Lawrence to the Lawrence Institute, dated Nov. 25, 1850, is a part of the Mead tract. The west strip of block one, is of the Mead tract. It is eighty-odd feet wide. Mead, and afterwards the Lawrence Institute, owned the west eighty feet of block one, thirty-one, forty-five, thirty-eight, and eighteen, lots one and two of the triangular piece shown on the plat, on part of block one, and of the Mead tract also.

Being cross-examined by the plaintiff's counsel, the witness testified as follows :

24 Question. When did you first take charge of, or have connection with, the Lawrence University?

Answer. Ever since its organization under the charter.

Question. That was in September, 1847, was it?

Answer. My name appears in the charter.

Question. Well was it in 1847?

Answer. It will show in the charter.

Question. When did you first become connected with the Lawrence University?

Answer. From its inception.

Question. When was its inception?

Answer. I don't know. The institute organized in 1847. I was connected with it from its inception. My first connection with it was as a trustee. I was a trustee one term. I was in the third class of trustees, and my term of office was three years, and expired at the annual meeting in 1850. I was never trustee after that time. In 1847, I was appointed general agent of the institute. I think I continued general agent three years. I was endowment agent after that time in 1858, and that was all. I ceased to be endowment agent about two years after I went there. I was endowment agent from 1858 to 1860. That is all the connection I have had with the institution since that time, officially. When I went from Green Bay to Appleton to make the location, Wm. H. Sampson, Geo. E. H. Day, of the committee, and H. S. Wright,
25 surveyor, with his staff, went with me, and others whose names I do not recollect. At that time we had only organized and provided teachers for the preparatory department. That was all, according to my recollection. The building we were authorized to locate there was to be used for the Lawrence Institute.

Question. Were any of the preparatory departments organized before that time?

Answer. It was the Lawrence Institute then. We commenced the erection of the old building in 1847.

Question. What time in 1847?

Answer. My testimony states that I made the contracts in August, 1847.

Question. When was the erection of the building commenced?

Answer. The workmen commenced to work in the winter preparing the ground and getting out stone and timber.

Question. In what winter?

Answer. In the winter of 1848—'9. They commenced getting out

the stone and timber in the winter of 1848 and '49. The contract for the erection of the building was made in August, 1848, and they commenced work the winter following.

Question. When did they commence the erection of the main building?

Answer. What building, sir?

Question. You have lived in Appleton for twenty years, have you not?

Answer. Nearly.

Question. Do you live in sight of the Lawrence University?

Answer. Yes, sir.

26 Question. Do you know any building there called the main building of the Lawrence Institute?

Answer. Yes.

Question. When was the main building commenced?

Answer. I cannot tell without looking at some memoranda.

Question. How long has it stood there?

Answer. I cannot tell without looking at the record.

Question. Well, about how long?

Answer. I have no memoranda here by which I can tell, but I think it was in 1853 that it was erected. It was built of stone in the basement and wood above the first story. It was 60 feet by 120 feet, five stories high. It is located on the Law tract. The building shown on the map represents the University building. I got up this map myself. The red block on the map represents the college buildings, which were contemplated, when I was endowment agent, and towards the building of which I asked the people to contribute. Others of the university buildings are represented on the map. The main building is five stories high, and is located on the Law tract. It is not in the Mead tract. The Mead tract adjoins the Law tract, and a part of it, the eighty foot strip I have mentioned, is embraced in the same enclosure. Some of these lots are 60 feet by 120 feet and 160. The lots in block 35 are 81 feet by 166. The blocks are 350 by 350 feet. The university block is 1,050 feet wide from east

27 to west; of that block 80 feet off the Mead tract is included inside the fence. The university building has four fronts. It fronts east, west, north, and south. The west front of the university building is over 300 feet, east of the east line of the Mead tract. The entire building is over two hundred feet, east of the east line of the Mead tract. They have nothing else there but the building. They have used the building since it was erected for recitation rooms, cabinet, chapel, and for the male department of the college. The females recite in the other part. The female department is entirely separate from it.

Question. Is that the department where the school is mainly carried on; has not the main department of the school been conducted there?

Answer. Mostly on the other grounds. The instruction of the males on the Law tract; the instruction in music, and the auditing of the accounts are all done on the Mead tract. The board of trustees

meet on both tracts. Can't say where the annual meetings of the board were held. The building on lot three was used as much for preparatory purposes as for college. I cannot say that a college class was ever permanently formed prior to the building of the old building. I think no pupils were ever graduated from that building. Think it burned before any pupil graduated. When the old building burned they removed to lot 2 on the Mead tract. The lot they purchased of one Webb, and made it as commodious as they could
28 for the accommodation of students. The old building burned Jan. 4th, 1857. I cannot say whether the institute leased the building from Webb before they purchased it or not. On the Webb lot there was a substantial building with upright body, and a wing on each side.

Question. Was it designed, when fitted up, to be occupied as the ladies' department of the university?

Answer. I suppose the object of it to be for the same purposes as the other was. I have said in my testimony that it was to be for the ladies' department. It was used as a boarding house for the lady pupils. It was on block two (2) on the Mead tract. It is still used as a boarding house for the business of the college; I suppose keeping a boarding house is the business of the college. Some of the teachers, both male and female, boarded there. Some of the male pupils board there at times. There are recitation rooms in that building, and I have often been in the building with the professors. I cannot say how many of the teachers heard recitations there. I know Professor Phinney did, and kept a boarding house there. He lives there himself. I never said I heard recitations there. I have heard him say it was time for classes to recite, and when they began coming in I left.

Question. Is it not the main or principal use made of that building to use it as a boarding house, and a residence for the professors?

Answer. I should not think it was. I think it is used some more than that.

29 Question. For what?

Answer. I think the transaction of the business of the college, the auditing of the accounts, &c. A few of the pupils board there with the professors, but the most of them board elsewhere, at private houses. The pupils lodge in the main building and feed elsewhere. Those can that choose to.

Question. Was there any building put up on the Mead tract until after the first of November, 1848?

Answer. I said in my testimony the building was occupied. I cannot tell dates twenty years back. I think the building was erected in 1848 or 1849. Before that, temporary shanties were erected. The premises were an entire wilderness then.

Question. Was there a single stone or plank put on that ground before the 1st November, 1848?

Answer. Yes, sir. It was put there by the contractor, Mr. McGregor. His contract was made in August, 1848.

Question. Did McGregor get anything out there between August and the 1st of October, 1848?

Answer. McGregor had nothing to do with the getting of materials. I was east. I went east immediately after making these contracts, or soon after, and returned on the ground, with my family and effects, on the 29th of February, 1849, and the men were then at work when I returned. I cannot say how many days it was after I made these contracts, in August, in 1848, that I went east. I remained there until February, 1849, or the month following.
30 I went and returned. I was at Appleton more than once that fall, but I cannot say how many times I was there before going east, after making these contracts. I started east about the last of September. Prior to the time I started east, we did not have any building erected on the Mead tract. I think there were some materials there, but I was not there to see it. I went on a tour to Sheboygan, Fond du Lac, Milwaukee, and Detroit, and so around back again.

On being re-examined by the counsel for the defendant, the witness testified as follows:

The preparatory building was commenced when I purchased the lumber, in August, 1848.

Being again cross-examined, the witness testified as follows:

The university have no building upon block 3, now. They own a part of it, but have no building on it. They had a building on block 3 that was used for boarding purposes; that was not burned in 1857. They sold the block somewhere about 1858. I did not do the business.

John F. Johnson was called, sworn, and examined as a witness on behalf of the said defendant, and testified as follows:

I reside in Dodge county. I resided at Appleton. I first moved there about the last of August or the first of September, 1848.
31 I went there to erect a boarding shanty for the men who were at work on the Lawrence University, and I did erect such a building. It was about the twentieth of August, 1848, that I went to work there with a gang of hands. I was employed by H. L. Blood. I think he was steward of the board of trustees. I erected this building on block 29 of the village plat, on what is called the Mead tract. The building is not there still. I think it is all removed. It was standing until within the last year or two. It did not take many days to erect that building. I commenced clearing ground and cutting brush the 20th August, and at the same time commenced drawing lumber from Duck Creek. That building was used for the purpose for which it was erected. I occupied it until March, following. I do not know how long it was used after that. I assisted in getting out the timber for the institute building that was erected upon lot 2, block 3. I went there in August with a lot of hands. We commenced getting out timber north of the university. I think it was

on the village plat. I got some of the lumber on the plat where the building was erected, in August, 1848, and continued right on. I went to drawing lumber enough to complete my house, and I drew some three or four thousand feet of lumber. I ordered the men and teams to draw timber for the university building. I was then
32 employed by Col. Blood. He was the managing man of the institution. The foundation of the building was of stone. The basements were made of stone. It was commenced in September, if I remember. Mr. Baily hauled the stone for it and put it up. I was there until the building was finally put up. The frame work was raised on the third day of July, 1849. They had a celebration in the building on the 4th July. There was no interruption in the work on the building. It continued right along. The school went into operation in that building in the subsequent fall. I think in November. It was in the fall of 1849. I am nearly sure.

Anson Ballard was called, sworn, and examined as a witness on behalf of the defendant, and testified as follows:

I reside in Appleton, and have resided there since April, 1850. I was there in the fall of 1849, on a visit to the place. I am acquainted with the ground owned by the institution on the Mead tract. Block 13 is directly opposite where the female department is carried on. My homestead is just cornering, so is block 13, where I live. This is the property embraced in this suit. Directly north of it is block 3. The building in which the students took refuge, after the fire, is on block 2, and occupies lots 6, 7, 8, and 9. I think they are ten feet from the south side of the tract, or something like it. On lot 9 and lot 6, there is a little strip running
33 through. I may be mistaken about the number of feet. Block 13 is colored on the map, because it is the lot on which the institution stands. The Law track is that tract so designated on the map, and includes 31 acres which belongs to the university now. Block one (1) on the plat extends from what is called Drew street, across the Law tract, and across the 31 acres east. I think that block is understood to contain eight acres. The large building is on this block, which contains nearly or quite eight acres, one part of which is the Mead tract and part of which is the Law tract. The principal building is not far from two hundred feet from the line of the Mead tract. I have been trustee, and one of the officers of the corporation of the Lawrence University for the last ten years. I have been vice president and auditor. The business of the university has been transacted on both tracts. Part is transacted on the Law tract and part on the Mead tract, in different buildings. The institution has financial business, of course, and must have a financial department. The officers mostly live and transact their business on the Mead tract, and have their places of business on that tract too. I think most of them, ever since their connection with the institution, have had their place of business on that tract. The literary and educational branches of the business, previous to 1853, were carried on
34 by the officers of those branches on the Mead tract. Since

Answer. McGregor had nothing to do with the getting of materials. I was east. I went east immediately after making these contracts, or soon after, and returned on the ground, with my family and effects, on the 29th of February, 1849, and the men were then at work when I returned. I cannot say how many days it was after I made these contracts, in August, in 1848, that I went east. I remained there until February, 1849, or the month following.
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on the village plat. I got some of the lumber on the plat where the building was erected, in August, 1848, and continued right on. I went to drawing lumber enough to complete my house, and I drew some three or four thousand feet of lumber. I ordered the men and teams to draw timber for the university building. I was then
32 employed by Col. Blood. He was the managing man of the institution. The foundation of the building was of stone. The basements were made of stone. It was commenced in September, if I remember. Mr. Baily hauled the stone for it and put it up. I was there until the building was finally put up. The frame work was raised on the third day of July, 1849. They had a celebration in the building on the 4th July. There was no interruption in the work on the building. It continued right along. The school went into operation in that building in the subsequent fall. I think in November. It was in the fall of 1849. I am nearly sure.

Anson Ballard was called, sworn, and examined as a witness on behalf of the defendant, and testified as follows:

I reside in Appleton, and have resided there since April, 1850. I was there in the fall of 1849, on a visit to the place. I am acquainted with the ground owned by the institution on the Mead tract. Block 13 is directly opposite where the female department is carried on. My homestead is just cornering, so is block 13, where I live. This is the property embraced in this suit. Directly north of it is block 3. The building in which the students took refuge, after the fire, is on block 2, and occupies lots 6, 7, 8, and 9. I think they are ten feet from the south side of the tract, or something like it. On lot 9 and lot 6, there is a little strip running
33 through. I may be mistaken about the number of feet. Block 13 is colored on the map, because it is the lot on which the institution stands. The Law track is that tract so designated on the map, and includes 31 acres which belongs to the university now. Block one (1) on the plat extends from what is called Drew street, across the Law tract, and across the 31 acres east. I think that block is understood to contain eight acres. The large building is on this block, which contains nearly or quite eight acres, one part of which is the Mead tract and part of which is the Law tract. The principal building is not far from two hundred feet from the line of the Mead tract. I have been trustee, and one of the officers of the corporation of the Lawrence University for the last ten years. I have been vice president and auditor. The business of the university has been transacted on both tracts. Part is transacted on the Law tract and part on the Mead tract, in different buildings. The institution has financial business, of course, and must have a financial department. The officers mostly live and transact their business on the Mead tract, and have their places of business on that tract too. I think most of them, ever since their connection with the institution, have had their place of business on that tract. The literary and educational branches of the business, previous to 1853, were carried on
34 by the officers of those branches on the Mead tract. Since

that time a part of the business has been carried on or divided between the two. That part of the business which relates to the financial department is mainly carried on on the Mead tract. The male department and business, by the professors and teachers, is carried on on the Law tract. The preceptors, and sometimes one or two of the male teachers, hear their recitations on the Mead tract. The boarding-house or boarding department is on the Mead tract. The steward's building is not on block (3) three. In addition to that building, another building was erected on the same block, called the steward's building, and I think was used for a year or two after the fire occurred; I think a little over a year. The business, and some of the recitations, according to my recollection, with the boarding department of it, is discontinued. They use the dining hall and lease this building on lot 2, which they subsequently purchased. That purchase was made in 1858.

On cross-examination by the plaintiff's counsel the witness testified as follows:

I am a lawyer, and keep an office in Appleton. My office is on block 28 on the plat. It has been there for the last eight years. I am the auditor of the university, and one of the board; what official business I transact for the university, I transact mainly at my own office. I keep an office in one of the buildings I occupy, and
35 have for the last ten years done the business in my own law office, where I have transacted the principal part of my business. The meetings of the board have very frequently been held in my office. The treasurer transacts his business there. He is a merchant. His office is in the same block. He transacts his business as treasurer at his store. The secretary transacts financial business. Prof. Phinney is secretary. I cannot tell how many years he has been secretary. He succeeded Mr. Buck, and was secretary before Mr. Buck was, and has now been secretary but a few months. Since he has been secretary he has lived on block 2, and kept his secretary's records there at the boarding-house. Mr. Buck lived in the lower part of the town, and not on the Mead tract. He was secretary for two years. While he was secretary his office was with the city clerk and deputy treasurer. Since my connection with the institution, the trustees have held their annual meetings on the Law tract in the main building, the stone building designated on the map by a red block. The squares on the map colored green represent the Law tract, with the exception of the 80 feet strip on the west, and a portion of the Mead tract, extending west to the ravine. There is a street there. The ground shown in the green blocks is enclosed as the college ground, but not platted. There is a triangle be-
36 tween the college ground and Drew street. The lower green square represented on the map only is fenced in with the college buildings. The lower part of the triangle is owned by some one else. The fence runs east from the avenue to the river. All the students who ever graduated there were graduated from the stone building. The college classes were formed about the time that the stone building was commenced. I have no distinct recollection, and

would not be positive that any college classes were formed before they went into the stone building, but I think they were formed about that time. The building on block three is not a boarding-house exclusively. The females are required to board there when there is room enough for them, and they choose to do so; they are admitted there. It has always been used as a female boarding-house. The new building was commenced in 1853. They had a public demonstration when the corner stone was laid. It was at the time of the usual exhibitions of the institution. It was so far completed as to be occupied in 1855, and the old building burned in 1857. The main building was erected and occupied prior to 1856. The preceptress has always from the first heard her regular recitations in that on block 3 before the fire, and on block 2 ever since the fire. Also the music teachers have given their lessons there. The first building of stone, represented on the plans, was erected on block three; another, a two-story building for the steward, was erected in 1852, on
37 the same block.

Being re-examined by the counsel for the defendant, the witness testified as follows: The plat of the Mead tract was recorded in 1849, in Brown county before the county of Outagamie was organized. When I purchased the premises in dispute in this suit, the university building, was on block 3. That was the only building of the institution at that time. A part of the premises I purchased in 1851, and a part in 1855. The lots I purchased before the date of the deeds. I had a contract for the lots in 1851. I was at Appleton in 1850. Mead was living at that time. When I purchased there were improvements on the premises in dispute in this case. There was a small dwelling house on it, about 16 by 20 feet, one and a half stories high, with a small addition in the rear. I had other improvements on the Mead tract which were made in Mr. Mead's lifetime. My partner, Mr. P. H. Smith, and I had an office on the Mead tract. It was just finished when I came there, which was April 3d, 1850. I think John F. Mead died the 22d of May, 1850, or within a few days of that time. The institute building (the drafts of which are now shown to me) was at that time completed, but instead of two gables there were four, and a small tower in which the bell was located. There were a good many other improvements on the Mead tract. I cannot say how many. I have made no special estimate. There were quite a large number of houses at that time, as many as thirty or forty.

38 Being again cross-examined by the plaintiff's counsel, the witness testified as follows:

Mr. Mead lived at Green Bay. He did not live at Appleton. I think he died in May, 1850, and I came there in April of the same year.

The defendant, by his counsel, then read in evidence the following documents, viz:

1. A power of attorney from Amos A. Lawrence to Frederick Packard, dated the 20th day of July, 1850, duly executed and

acknowledged, empowering the said Packard, inter alia, "to sign, seal, and deliver, any contract for the sale of land lying within said State of Wisconsin, and belonging to me, the constituent;" and further purposes enumerated in said power, the said Lawrence thereby granted to his said attorney "full power to execute and deliver all needful instruments and papers, in addition to those above recited, whether under seal or otherwise.

2d. A power of attorney from Amos A. Lawrence and Elizabeth Lawrence, his wife, to the said Frederick Packard, dated the second day of August, 1850, duly executed and acknowledged, empowering the said Packard for them, and in their names, to execute and deliver quit claim deeds, conveying any lands lying in said State of Wisconsin and belonging to them, or either of them, and authorizing the said Packard to release the right of dower of the said Elizabeth A. Lawrence in all the said lands conveyed.

39 3. A deed containing the usual covenants of warranty from Amos A. Lawrence and wife to Hoel S. Wright, of Brown county, Wisconsin, dated the 6th day of June, 1851, duly executed and acknowledged by Frederick Packard, attorney in fact for said grantors, and recorded June 6th, 1851, in the officer of the register of deeds of Brown county, Wisconsin, conveying for the consideration of one hundred and fifty dollars, the east half of block, number 13, in the village of Appleton, according to the plat of said village.

4. A deed containing covenants of seizin of title against incumbrances and warranty against all persons claiming by, through, or under the grantors, executed by Hoel S. Wright and his wife to the defendant, Anson Ballard, conveying to said Ballard, for the consideration of twenty-five dollars, the following described premises, namely: beginning at a stake in the north line of block 13, in the town plat of Appleton, where a north and south line would divide said block in the centre as to quantity of land, should intersect said north line; thence east, along said line, forty feet; thence south, forty feet; thence west, forty feet; thence north, forty feet; to the place of beginning, containing sixteen hundred feet, of ground, the land thereby intended to be conveyed being declared to be forty feet square, out of the northwest corner of the east half of said

40 block 13, which deed was dated November 14th, 1851, and was duly executed and acknowledged, and was recorded in the office of the register of deeds of Outagamie county, on the 23d day of June, A. D. 1856.

5. A deed dated the 26th day of January, 1853, executed by Hoel S. Wright and his wife to the defendant, Anson Ballard, conveying, for the consideration of two hundred dollars, the east half of said block 13, in the village of Appleton, except the portion thereof, conveyed by deed last above described, which deed contained covenants of seizin against incumbrances and of warranty against all persons claiming the same by, through, or under the grantors, and was duly executed and acknowledged, and was recorded in Outagamie county, 26 January, 1853.

6. A quit claim deed, dated the 23d day of April, 1851, from Amos

A. Lawrence and his wife to Reeder Smith, conveying, for the consideration of one thousand dollars, to said Smith, the following premises, viz: west half of block 13, lot 14, block 12; lot 2, in block 11; also the tract of land bounded by a line running as follows: commencing at a point in the north line of Lawrence street, 120 feet west from the southeast corner of block No. 6, and running westward in the said north line of Lawrence street, 60 feet; thence northward, in a line parallel to the line of Appleton street, one hundred and fifty-four feet; thence eastward, in a line parallel to the line of Lawrence street, sixty feet;
41 thence southward, one hundred and fifty-four feet, to the place of beginning. Also lot 2, in block six; lots 5 and 6, in block 36; lot 11, block 25. Also that part of lot 12, block 40, bounded as follows: commencing at the southeast corner of said block and running westward in the north line of Edward street, sixty feet; thence northward in a line parallel with Brown street, one hundred and twenty feet; thence eastward in a line parallel to the line of Edward street, sixty feet to the west line of Brown street; thence southward on the said west line of Brown street, one hundred and twenty feet. to the place of beginning. Also lot 8, in block 11. Also lot 5, and a part of lot six, being sixty feet wide by 160 feet deep, and bounded by the south and west lines of the said lots in block No. 6; lot 11, in block 12; lots 8 and 9, in block 12; lots 1 and 6, in block 30. Also lots 9, 25, 26, and the west half of lot 27, and the west two-thirds of lot 10, in block B, excepting and reserving from the premises above conveyed a space six feet wide, and equal in length to the breadth of the said lots from the rear of lot two, in block six; lot six, in block twenty-six, and lot 5, in block 26, and granting unto said party of the second part, his heirs and assigns, the use of the said reserved ground, and all other reserves, for the purpose of alleys in said block, as alleys in common with the occupants of other
42 lots in the same block, excepting also lots numbered eight and nine, in block 12, which the said parties of the first part, by indenture dated the 23d day of April, 1851, conveyed to Perry H. Smith, the description and boundaries above given being according to the town plat of Appleton, as made by H. B. Wright, and a part surveyed anew by F. G. Mackelcan, which said deed was duly executed and acknowledged, and was recorded in Outagamie county, June 6th, 1851.

7. Also a deed of conveyance, executed by Reeder Smith and his wife to the said defendant, Anson Ballard, dated the 13th day of August, 1855, conveying to the said Ballard, for the consideration of one thousand dollars, the west half of block 13, in said village of Appleton, which deed contained covenants of seizure against incumbrances and of warranty, and was duly executed and acknowledged, and was recorded in Outagamie county, on the 14th August, 1855.

8. A deed of quit-claim, dated the 28th day of October, A. D. 1857, from Amos A. Lawrence and his wife to the said defendant, Anson Ballard, conveying to *to* the said Ballard, for the consideration of twenty-five hundred dollars, all that real estate known as the Appleton lands, and the water-power purchase, situate in Outagamie

county, Wisconsin, and known and described, according to the public survey thereof, as the southwest quarter of section one, containing 160 acres; the south half of the southwest quarter of
43 section two, containing eighty acres; the northwest quarter of section 11, containing 160 acres; the northeast quarter of section 24, containing 160 acres; lot 3, and the northeast quarter of the northwest quarter of sec. 25, containing 79 50-100 acres; the northeast quarter of southwest quarter, and lots two and three, of section 26, containing 149 18-100 acres. Also that part of lot 2, section 35, which lies east of the half quarter section line of section 26, produced to the Fox river, being 18 acres in township twenty-one north, of range (17) seventeen east. Also the southeast quarter section nine, (9,) township 21 north, of range 16 east, containing 160 acres. Also the following described blocks in Appleton village plat, to wit: All that part of blocks 48, 45, 34, 31, 1, 54, and 14, lying on lot 2, section 26, in township 21 north, of range 17 east; and all of blocks 49, 50, 51, 52, 53, 41, 42, 43, 44, 35, 36, 37, 38, 39, 40, 25, 26, 27, 28, 29, 30, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, and 24. Also all of blocks A, B, C, and D, according to a plan of the village of Appleton, surveyed F. P. Mackelcan. Also blocks 10, 11, and 12, as replatted by F. P. Mackelcan, which last-mentioned deed was duly executed and acknowledged, and was recorded in Outagamie county, April 21st, 1858.

9. A deed from Amos P. Lawrence and wife to the Law-
44 rence University of Wisconsin, dated the twenty-third day of May, 1857, conveying, for the consideration of fifty dollars, that piece or parcel of land in Outagamie county, known and described as all that part of section 26, in township 21 north, of range 17 east, known and described as block number one of the village plat of Appleton, surveyed by H. S. Wright, excepting and reserving therefrom lots three, four, and five, with right of way over lot 2, in said block theretofore conveyed by the parties of the first part to Lydia Sophia Johnson, which deed contained the usual covenants of warranty, and was duly executed and acknowledged, and was recorded in Outagamie county, July 25th, 1857.

10. Also a deed from William J. Well and wife to the Lawrence University, dated Sept'r 1st, 1858, conveying, for the consideration of three thousand dollars, lots 6, 8, and the west seventy feet of lot seven, in block 2, in the city of Appleton, said land being one hundred and fifty feet on Lawrence street, by one hundred and ninety-seven feet on Durkee street, which last-mentioned deed contained the usual covenants of warranty, and was duly executed and acknowledged, and was recorded in Outagamie county, Dec. 11th, 1858.

Thereupon, the defendant rested his case; and the plaintiff, upon his part, called Jared Thompson, who was duly sworn as a witness;
whereupon the defendant, by his counsel, made the following
45 objections to the testimony hereinafter contained, given on behalf of the said plaintiff, viz:

The defendant by his counsel objected to the testimony offered by the plaintiff for the following reasons:

1st. Because the same is incompetent, irrelevant, and immaterial.

2d. Because the deed from Mead to Lawrence reserves a power or provision to the grantor, John F. Mead, to repay the purchase money, or consideration paid, and to determine and reclaim the estate granted, conditioned on the failure of the location of the Lawrence Institute being made on the premises on or before the 7th day of Sept., 1848. Such power or provision is void; at any rate such power reserved to the grantee is limited to him, and can be exorcised or executed by no other person. It was a matter of election on his part in case of such failure whether to exercise it or not.

3d. Because it is apparent that the intention of the grantor reserving the power has been answered; and therefore the power itself must cease.

4th. Because the power was not exercised or executed within the time specified in the reservation, or in the life-time of the grantor.

5th. Because the provision or condition contained in the deed from Mead to Lawrence is void for repugnancy to and inconsistency
46 with the terms of the grant, and the nature of the estate granted as shown on the face of the deed.

6th. Because the conditions and provisions annexed to the grant are merely nominal, and evince no intention of actual and substantial benefit to the party, to whose or in whose favor they were to be performed, and are therefore void by the statutes of Wisconsin.

7th. Because, upon the face of the deed, it appears that the full consideration was paid by Lawrence to Mead for the land, and that the fulfilment or performance of the condition formed no part of the consideration of the conveyance.

The above objections were urged at the several stages of the testimony offered by the plaintiff. The court overruled the objections; admitted the testimony. Whereupon, the said Jared Thompson, jr., was examined as a witness on the part of the plaintiff and testified as follows:

I am a lawyer, and reside in the city of Milwaukee. I am a graduate of the Lawrence University. I graduated in 1859. I was in the third graduating class. I entered the university in the spring of 1853, and staid there until 1859. At the time I commenced in 1853, the only building which I remember as being occupied was the old institute which was burned. That was the only building occupied at that time, and it was used for the purposes of the institute.
47 It was used for the preparatory and collegiate courses. I am unable to say whether I was there when the foundation of the main building was laid. I think it was completed, and we got into it in 1855. I think the walls were up one story, when I went there. After that building was erected, it was the main collegiate school building. No classes graduated from that university, except those graduated from the main or stone building. After the old building was burned, they occupied a small building, which has been described as the Webb building. Nobody ever went into that, except a few ladies at that time. It was a boarding-house at that time. No other buildings were occupied by the university. There were none there

occupied except the main building. The main building was occupied before the old one was burned. The school for the ladies was continued in the old building, down to the time of the fire. It was used as a sort of dormitory for the ladies. The only change the burning of the old building made in the school was a change of the ladies' boarding-house; all else went on as before.

Being cross-examined by the counsel for the defendant, the witness testified, as follows:

The building I have called a small building was one which had been used as a residence. It was an ordinary sized wooden house.
48 I think there are additions built on to it. The ladies recited in the main building. There might have been a class or two of ladies, who recited there occasionally. The preceptress occupied that building. I cannot state from present recollection whether she had her recitations there or not. They had a piano in that building. My studies did not require me to be at that building at all.

Thomas R. Hudd re-called and examined on behalf of the plantiff, testified as follows:

In 1853, I became a student there in the Lawrence University. There was then there what was called the old building, the one that was burned. A few days after I went there, they laid the corner stone of the new building, the stone building, on what was always considered and supposed to be the college grounds. They commenced immediately after laying the corner stone, to erect the main building. It was finished some time in 1855. We went into the main building, as students, in 1855. About two years, perhaps a little more, after we occupied the stone building, the old building burned down. In the meantime it was occupied by the ladies for a boarding-house. The preceptress and music teacher were there and heard some classes there, and new classes were sometimes heard there. I was
49 studying there at that time. Another part of the school exercises was at that time held in the stone building; that is, in 1855. The morning exercise was held there. All the students were required to assemble at the stone building for prayers and general exercises, ladies and all. I graduated there. I quit there about the latter part of 1855 or early in 1856. I was connected with the institution from 1853 to nearly the close of 1855 or early in 1856. I went there to reside in July, 1853. I have resided there ever since. Prior to that time my parents resided at Neenah, four or five miles from there. Since the erection of the new building, there has been no university on the Mead tract at all. I did not so consider it. There has only been this boarding-house and the Webb house. But no part of the university in any respect, except the boarding at the old building. I had an interview with Amos A. Lawrence in reference to this matter, and a conversation with him on the 19th day of December, 1865, and also some days prior to that time, in Boston. I had this interview by the authority and as the agent of Edward L. Mead, the plaintiff. I then tendered to Amos A. Lawrence, the sum of four hundred and seventy-four dollars and some cents, the consid-

eration named in the deed from John F. Mead to him. I tendered him sufficient to cover the amount of the consideration sum. I
50 think I tendered $474 00, and I made the tender as the agent and attorney of the plaintiff, and I gave public notice that the plaintiff claimed title to all the lands embraced in the Mead tract. Lawrence did not take the meney, but I entered into an arrangement with him by which he could have it if he wanted it, and he was to let me know. It was not accepted by him then, but the next day he concluded to accept it, conditionally, and it is where he can get it at any time he chooses. I deposited it in Boston for that purpose. He was living a few weeks ago. It was always understood, while I was a student there, that the school on block 13 was the preparatory department. We always looked for the main building as the university.

On being cross-examined by the defendant's counsel, the witness testified as follows:

At the time I had the inteview with Mr. Lawrence, I supposed that he had made conveyance of his interest in the premises. I also knew that the defendant had purchased his interest, or that he claimed it, and I suppose, of course, that he claimed under Mr. Lawrence. I knew, by reputation, that Mr. Lawrence had parted with all his interest in that land, but what way I cannot state except as the records show it. Mr. Lawrence informed me that he had parted with his interest. He said to me, that he had nothing further to do
51 with it, and declined taking the money because he wanted to telegraph the defendant. He said that he was protected under the deed by a bond. I took as public possession of this tract as I could without making a fight with anybody. I presume a hundred and fifty different persons have been to see me about some of this land. I cannot tell how many. I do not think a thousand, but the number goes up pretty well into the hundreds. The tract embraces the larger portion of the city of Appleton. There is a railroad station on one corner of it; I think so. There are numbers of stores upon it; several churches. There may be some manufactories on it. I took possession of these lands by giving public notice through the press, and I gave individual notices to those whom I knew. I have the printed notice with me. That is what I mean by taking possession. I did not exercise any guardianship or ownership on the tract in dispute in this case, only I told Mr. Ballard that we intended "to fight it out on this line." I cannot now tell you how much of these improvements were made prior to Mead's death. I only passed through there occasionally. I think it was a small portion of them, a very small portion. He died in 1850, and the place was a small place then. There were not very many there when I went there.

The said plaintiff then gave in evidence a warranty deed,
52 in the usual form, from the Lawrence University, of Wisconsin, to John P. Parish, dated the 28th day of July, A. D. 1859, conveying, for the consideration of sixteen hundred dollars, lots numbers 18 and 19, in block 3, in said city of Appleton, which

deed was duly executed and acknowledged, and was recorded in Outagamie county, on the 20th day of April, 1860.

And the said plaintiff then read in evidence, a deed of conveyance from George W. Law, and wife, to Amos A. Lawrence, dated the 3d day of August, A. D. 1848, a copy of which is hereto annexed, and marked Exhibit No. 5. And the said plaintiff again rested.

Theodore Conkey was called, sworn, and examined, on the part of the defendant, and testified as follows:

I reside at Appleton; have resided there since 1849. I first visited the ground on which Appleton stands, in 1843, in the fall. There was no settlement there then. I was then a surveyor. I was formerly a practical surveyor. After my first visit, I was down again in 1848 or 1850. I think I first visited the place in the fall of 1843. I was there at various times, because I had located a depot for supplies there. I believe I was not there again until January, following.

53 Subsequently I passed through there. I think not more than once until I went there in the spring of 1849, and I think I was there in April. I made the original government survey of the tract on which the city of Appleton now stands. I was acquainted with John F. Mead. I don't recollect seeing him but once in 1848, '49, and '50. In the winter of 1849, or 1850, I passed through there. I might have met him at Green Bay; he was there. I think I met him at Appleton, in the winter of 1849 or 1850. I think there was the last place I saw him. He dined with me. He did not have to pass through the settled part of Appleton to get to my house. On that occasion, when he came there, he came from the south, and I lived in the south part of the town. I lived on the Mead tract, about 40 or 60 rods from the line. I do not think I could see the buildings and improvements on the Mead tract from where I lived. The country was covered with timber, or that portion of it which was not settled. I had some conversation with him in respect to the buildings that were being erected there. He enquired about the people, and how they were progressing, what the prospects of the town were, and about the town property. He did not speak of the Mead tract. He spoke of the town in general. It would embrace, of course, a portion of the Mead tract. He informed me that there

54 was a good deal of building going on, and seemed to express a good deal of pleasure. He said, if there was a town built up there, he felt that he was, in part, the founder of the place. He attributed the prosperity of the place to the location of the university there. I think he did enquire after the university generally. He spoke, or had a conversation, about every one that came along. The university was in operation at that time, for I recollect it well. He thought the university, and a good water power, would probably build up a respectable town. At that time, I think, the principal part of the improvements were on lots two and three, of section 26. That is on the Mead tract. Some improvements were being made at that time on some lots on section 35. The most on lots four and adjoining. It runs in and corners on lot 3, south of it. Mr.

Mead could not go through the town on his way home without seeing the improvements there erected. There was no other way to go, except on the Mead tract. There was a sawmill erected there, but whether it was on the Mead tract or not, I cannot say. I think it was on the point of section 35. That section terminates right where the mill is built. It is in plain view from where we dined. I should think there were forty houses then erected, or in process of erection, on the Mead tract, nearly all dwelling houses. One or two others I
55 think. I do not think there were any churches at that time. Some of them were fine buildings. Some very good, but the majority of them were rather small. There was one hotel, and two or three residences and one store that were good permanent buildings. The others were not very expensive. George Law, was the brother-in-law of Mr. Mead. Mead expressed a good deal of satisfaction at the location of the university building, and seemed greatly concerned about the welfare of the place at that time, and thought that much of it was due to his own efforts. I do not think I saw him after that. I think he died some time in the spring. I think that was the last interview I had with him. It would be difficult to make an estimate of the amount of improvements that were made on the Mead tract, up to the time of Mead's death. The college buildings were erected and in operation at that time which must have cost as much as eight or ten thousand dollars. There were some buildings that must have cost from $1,500 to $2,500 each. Several houses probably cost $1,500 or there abouts, were erected at that time, and a good many that did not cost over $500 or $600 each. So it would be extremely difficult to state the amount of the improvements.

Being cross-examined by the counsel for the plaintiff, the witness testified as follows:

Question. Had you any conversation with the officers of the
56 Lawrence University, with reference to the location of it?

Answer. I think in 1850, there were some questions raised that were not fully settled, but what they were, I do not remember. It was intimated that possibly the location might be changed. It was understood that a building was to be put up on a tract of land adjoining the Mead tract, and they would have then a rival village started, but it all now constitutes three wards. I made a proposition to some one in connection with the university. I think I made a proposition to change the location of it at that time to some one connected with the university, but whether to Dr. Darling or Mr. Smith, I cannot now say. I made a proposition, and I think that was the last I heard of it.

Reeder Smith was recalled by the defendants counsel, and testified as follows:

I had various interviews with John F. Mead a year or two before he died. I knew him well. I met him at Green Bay in 1846, and in my visits after 1846 and '47, and I conferred with him on the subject of this land now in dispute in Appleton, where the institution is now located. I had conversation with him in respect to the location of the university. I think I saw him at Appleton in the winter of

1849–'50, at the time Mr. Conkey speaks of. The institute
57 was then built and in operation. I cannot be certain whether the boarding-house was up or not, but there were two buildings built for hotels, and there were some two or three stores. My house was erected and I had sold to different purchasers, (actual settlers,) sixty-five lots, all conditioned upon their building upon them.

Question. Did Mr. Mead express any dissatisfaction in regard to improvements made there?

(To which question the counsel for the plaintiff objected on the ground that the same was irrelevant, immaterial, and incompetent. The court overruled the objection, to which ruling and decision of the court, the plaintiff, by his counsel, did then and there except.)

Answer. His expression was general satisfaction and pleasure in the growth and prosperity of the town. Mr. Mead said to me, he would endeavor to get Mr. Law to let Mr. Lawrence, who was then the proposed founder, have such land adjoining as he had agreed to convey. Mr. Law and Mr. Mead, one year previous to this sale to Mr. Lawrence, both proposed to sell this tract to Mr. Lawrence, and I carried the proposition to Mr. Lawrence, who had proposed his donation through me to this country, conditioned on the location of the institution on the land, the four thousand acres which he owned, a little above a dam which was then built on the Fox River. I was
sent to the proposed tract to investigate the subject, with
58 instructions when on the land to make notes on the spot and report to him. I reported to him in favor of locating upon the land at Appleton instead of locating upon the land he owned before. I obtained diagrams from the land office at Green Bay of all the land I reported upon and returned to him a proposition to select the spot where the town of Appleton is now situated. He declined purchasing and his proposition to donate $10,000, was considered at an end. I was afterwards requested to go to Mr. Lawrence and get him to renew his proposition. I returned for that purpose, and he renewed his proposition, provided so much front could be obtained on the river, and that would include the Mead and Law tract. When I returned, Mr. Mead asked one hundred and twenty-five doldollars more for the tract than at the time of the first proposition, as his proposition had terminated by lapse of time. I was then expected to raise $25,000, if that was agreed to, to put up the buildings. I said to Mr. Mead, if you will give your influence in the work when it is commenced, then I will have the money for you. If you will endeavor to get Mr. Law to give or sell his. He said he would endeavor to get Mr. Law to agree to convey the land away to the institute. I supposed as far as my agency was concerned, I had
made the agreement in full. I think Mead died in May.
59 I know I passed the building in which he died just before it burned. He said he would use his influence in the purchase of this tract, and I suppose he did.

George H. Meyers was then called, and sworn and examined as a witness on behalf of the defendant, and testified as follows: I reside at Appleton, and have resided there since the month of October

1849. I had no particular acquaintance with John F. Mead in his life time, but have met him; I saw him in Appleton, perhaps in Green Bay also; I think in Appleton first. I was there in the fall of 1849 or the winter of 1850, probably in the winter; I know it was a few weeks or months after he came to Appleton; I saw him, but do not think I had a personal introduction to him. I saw him in front of a tavern kept by a Mr. Warner; he was on his way to the southern portion of the State, and had his team with him. I don't think he had any particular business there at the time; don't know whether he was there on any other occasion. When I saw him he was on the Mead tract; we met about the middle of the tract of the government survey. There was no difficulty in seeing the improvements that were going on there. The institution was in plain sight from where I saw him; it was only a few rods away.

60 John F. Johnson, recalled and further examined on behalf of the defendant, testified as follows: I know John F. Mead very well. I saw him at Appleton; he used to stop at my house; it was the only public house there at that time. I had a house at Appleton. I kept the post-office there; that was on the Mead tract. I saw Mr. Mead there several times. He expressed nothing in regard to the improvements, except a lively interest for the growth and prosperity of the town.

The defendant here rested; and the counsel for the plaintiff then read in evidence extracts from the book of records of the board of trustees of the Lawrence University, of which the following are copies:

[Page 46, June, 1850.]

On motion,

Resolved, That Hon. M. C. Darling be appointed a special agent of this board to visit Boston and confer with Amos A. Lawrence, esq., and enter into any negotiations with him in relation to the subject of his proffered donation to the Lawrence University, and in relation to the donations of Messrs. Law and Mead.

Resolved, That said agent lay before Mr. Lawrence for his consideration all information upon the subject of Law and Mead's grants and conveyances, and that he be fully authorized to negotiate all matters not inconsistent with the evident intention of the donor and the interests of the institution.

61 Resolved, That the Rev. J. B. Prescott be requested to furnish said agent with the proper evidence relative to the lands conveyed by Law & Mead and others, and the manner of obtaining such conveyances and the rights of the institution therein.

[Extract read from page 49, Aug. 28th, 1850.]

On motion of J. B. Prescott,

Resolved, That the proposition of A. A. Lawrence, esq., made through the president of this board, be accepted, with the understanding that the college buildings referred to therein are to be located on block (1,) as designated on the village plat of Appleton, and

that the said president and our secretary be authorized to execute, on the part of the board and under its seal, the deed of release furnished by said Lawrence, and receive from him a certified copy of the deed of trust to C. H. Parker, of Boston, making over the sum of ten thousand dollars for the benefit and use of the Lawrence University; also, to procure the necessary conveyance to the board of the Law tract, heretofore conveyed to said Lawrence, for the benefit of the university, to be obtained from said Law and Lawrence by joint or a separate deed, or bill in chancery, as may be necessary.

Resolved, That the president and secretary be authorized to negotiate with said Law, if possible amicably, as to the conditions of the tract in relation to his donation, and to have the same made applicable to the erection of the university buildings, and to give him any necessary guaranties, in behalf of the board, for the execution
62 of said trust, whenever a proper conveyance of said land shall be made to the trustees.

[Extract from page 59, June 6th, 1851.]

On motion,

Resolved, That the treasurer make a tender of five dollars to Mr Lawrence's agent, and demand a deed for block No. 1, in the village of Appleton.

[Extract from page 78, July 7th, 1852]

Resolved, That Geo. H. Meyers, esq., of Appleton, is employed as solicitor to attend the court of chancery in our behalf as respondents to the bill or petition of Amos A. Lawrence, esq., of Boston, for the transfer of the Law tract to this board of trustees.

Resolved, That Henry L. Blood be authorized, on behalf of the board of trustees, to apply to Amos A. Lawrence, of Boston, the special trustee of the Law tract in Appleton, for permission to clear off and improve the college square on said tract, and otherwise prepare the same for the erection of the university buildings.

[Extract from page 79, Sept. 1st, 1852.]

On motion of Robert Flint,

Resolved, That the resolution of this board, authorizing Geo. H. Meyers to act as solicitor to attend the court of chancery on our behalf, as respondents to any bill or petition of Amos A. Lawrence for the transfer of the Law tract, so called, to this board, be, and the same is hereby rescinded; this board being advised that such
63 proceedings are unnecessary, and that the legal title is already vested in the trustees of said institution.

Resolved, That for the purpose of saving allquestions about any title that may be supposed to be in Amos A. Lawrence, esq., by the conveyance of said tract to him in trust for the university or institute, the said Lawrence is hereby respectfully requested to execute a release of any and all interest which he may have in the same, and that the board will indemnify and save him harmless in all things in consequence of such release or quit-claim deed.

[Extract from page 81, Sept. 2d, 1852.]

Resolved, That the executive committee be directed not to commence the erection of the college buildings, otherwise than by prepaying materials therefor, until sufficient funds are secured to enclose it.

Resolved, That no contract shall be closed or plan adopted for said buildings without the sanction of the board of trustees.

[Extract from page 84, Feb. 28th, 1853.]

Resolved, That H. L. Blood be, and he is hereby, authorized to procure the shingles for the contemplated college building on the best terms possible.

Resolved, That H. L. Blood and Robert R. Bateman be, and they are hereby, appointed a committee to get the basement of said building dug.

64 Resolved, That Henry L. Blood be, and he is hereby, empowered to make contracts for the erection of said college building.

[Extract from page 145, Feb., 1857.]

Resolved, That the executive committee be, and they are hereby, authorized to bargain for the sale and lease of lots of the Academy square; provided that no corner lot on College avenue shall be sold for less than $40 per foot front, and no other lot less than $20 per foot front.

[Extract from page 153, July 2d, 1857.]

Resolved, That the executive committee be authorized to lease or sell the land belonging to the university, as in their judgment is necessary for the institution.

[Extract from page 187, March 12th, 1860.]

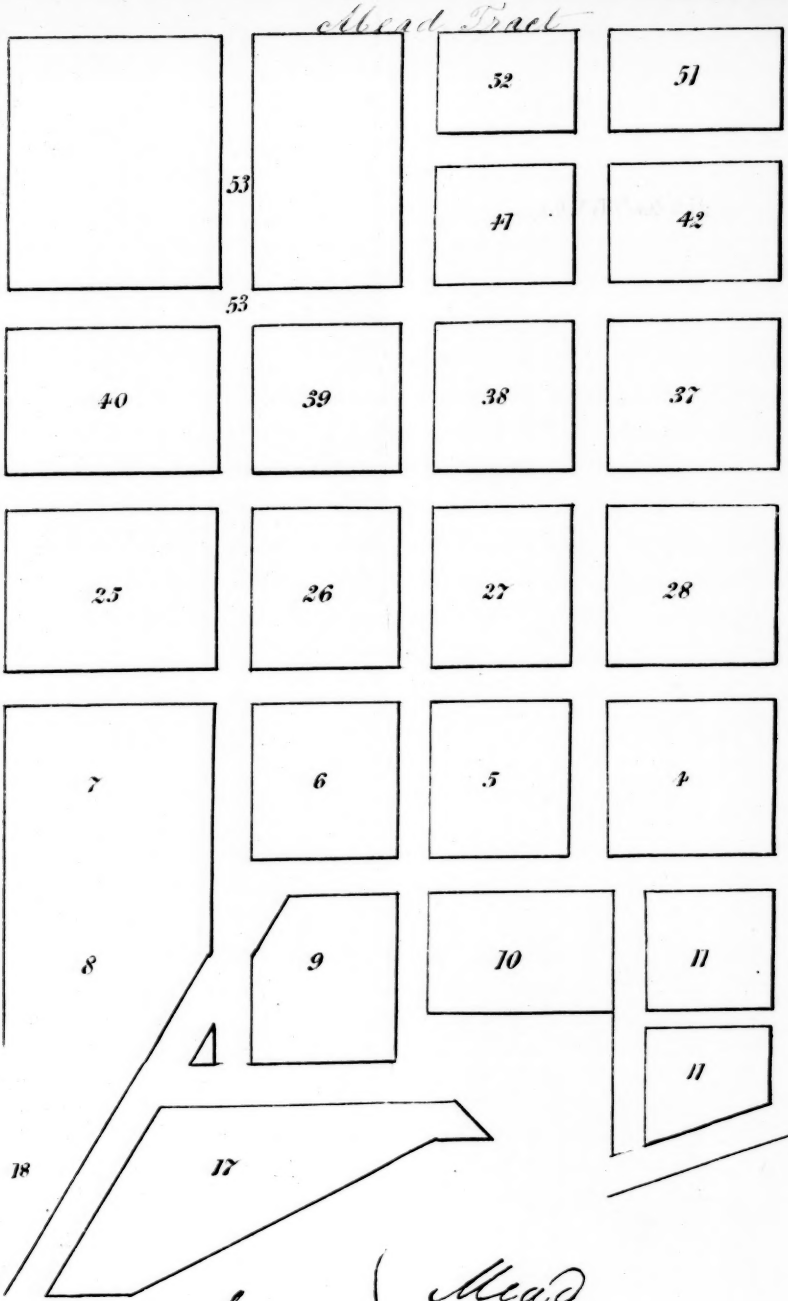
On motion,

Resolved, That Rev. H. Thomas be recommended to make sale of the university lots in block 3, in second ward; also such other real estate as in his judgment can be sold advantageously to the university.

The testimony was here closed, and the said judge did thereupon give his opinion and decide, and did then and there charge and instruct the said jury—

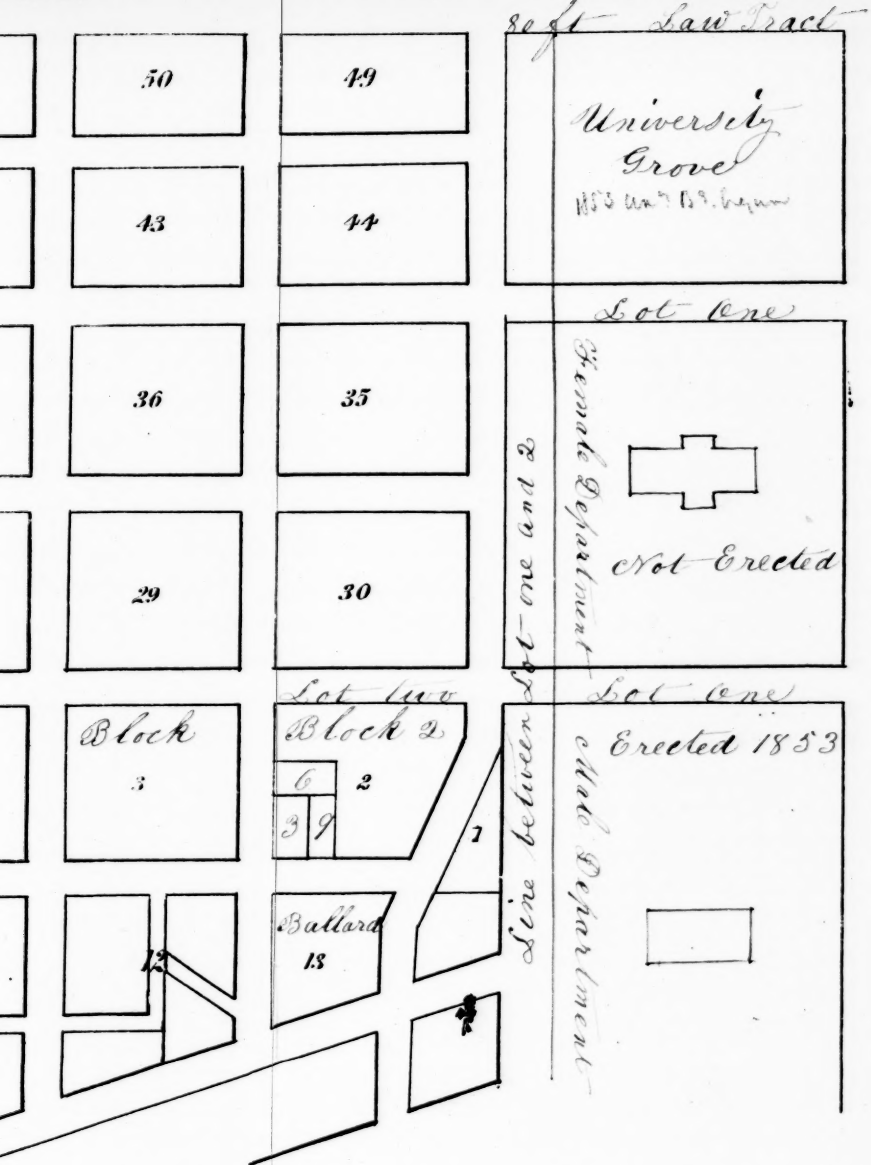
First. "If the Lawrence Institute was located on the land conveyed by Mead and wife to Lawrence, on or before the seventh
65 day of September, 1848, and then proceeded to erect a building thereon which was used by the institute in its business, and Mead had knowledge of such erection and use, and that the land was being laid out into lots and sold to purchasers, who were improving them, and made no objection during his lifetime, his heir cannot, since his death, claim a forfeiture of the estate against the defendant, a purchaser of the land in dispute, under said deed from Mead and wife to Lawrence."

Exhibit No



No. 229 { Mead vs Bullard

t No 1.


80 ft Law Tract
50
49
43
44
University Grove
36
35
Lot One
Female Department
Lot one and 2
Not Erected
29
30
Lot two
Lot One
Block 3
Block 2
6
2
3
9
1
Erected 1853
Male Department
Line between
Ballard
18
12
River

hage 6y

To which opinion, decision, charge and instruction, the said plaintiff, by his counsel aforesaid, did then and there except.

And the said judge did, then and there, further give his opinion, and decide, and charge, and instruct the said jury, that "the tender of the purchase money in the year 1865, by the heir of John F. Mead, this plaintiff, to Lawrence, after the land in dispute had been conveyed to the defendant, cannot prejudice the defendant's title under the deed of John F. Mead."

To which opinion, decision, charge and instruction the said plaintiff, by his counsel, did then and there except.

And the said judge did, then and there, further give his opinion, and decide, and charge, and instruct the said jury, that "if John F. Mead knew of, or advised the deed from Law to Lawrence, for the purposes of the institution, and did not claim the forfeiture of the condition in his deed; his heir cannot claim a forfeiture against the purchasers under his deed to Lawrence, and the subsequent
66 erection of a permanent building for the University on the Law tract adjoining the Mead tract, worked no forfeiture of the condition in the conveyance of Mead and wife in favor of the heir of Mead."

To which said opinion, decision, charge, and instruction the said plaintiff, by his said counsel, did then and there except.

And because none of the said exceptions so offered and made to the opinions and decisions of the said judge do appear upon the record of the said trial, therefore on the prayer of the said plaintiff, by his said counsel, the said judge hath, to this bill of exceptions, set his seal according to law, and the practice of this court, this 19th day of September, 1866.

[SEAL.] A. G. MILLER.

[Here follows the map marked page 67]

68 *Exhibit No. 2.*

This agreement of two parts, made and concluded this fourteenth day of August, A. D. 1848, between Reeder Smith, as agent of the Lawrence Institute of Wisconsin, and in the name of the said corporation of the first part, and W. H. McGregor, of the State of Wisconsin, of the second part, witnesseth: That the said party of the second part, for the consideration hereafter mentioned, doth, for himself, his heirs, executors or administrators, covenant, promise, and agree to, and with the said Reeder Smith, agent as aforesaid, and the trustees of said corporation, or their successors in office, that he, the said party of the second part, shall and will, within six months from the 1st day of August, 1848, in a good and workmanlike manner, and according to the best of his knowledge and skill, well and substantially erect, build, set up, and finish all the carpenter and joiner work; also to perform, or cause to be performed, all the painting and glazing necessary to perfect and complete one house, for a preparatory college building, at Grand Chute, on the Fox river, (sec. 26, town. 21, range 17,) it being a part of the Lawrence Institute of Wisconsin.

The building so to be erected is, in part, represented by a draft exhibited to the contractor, and may be found with the treasurer of the corporation. Said edifice is to be seventy feet by thirty on the ground, and three stories high, with posts twenty-nine feet
69 long; first story to be ten feet; the second, nine (9) feet; the third, eight (8) feet in height. The said building is to be divided into and finished in thirty-three (33) rooms of the size indicated on said draft, with thirty-six (36) doors (three outside, six pannel, and thirty-three (33) inside, wide stiles and two pannels.) The sash to be made with check rails, for the whole building, eighteen windows to each story. The sash for the first story to be ten by fifteen inches; the second ten by fourteen; the third ten by twelve; and twelve lights each. The window sash to be hung with springs, so that the top sash will slide down as well as the bottom one slide up. The chapel room is to be studded or supported by three turned columns. The floors are all to be planed and matched. The work to be done in all respects as well as the work to the Episcopal Church, in Sheboygan. The cornice to be made heavier than that upon the Episcopal Church, in proportion to the relative size of the buildings. The water is to be conducted from the roof at each corner by a tin gutter, put in with the shingles, running the length of the building. All the above job of work is to be performed, as either implied or expressed by contract or draft, so as to perfect and complete all the joiner and carpenter work, and glazing, and painting with two good coats of white lead outside, and in so as to perfect all the
70 building, except the mason work, which is to be done so as not to hinder the carpenter work.

The said party of the second part obligates himself to finish and perform all of the above job of work for the sum of seven hundred and twenty dollars, ($720,) to be paid as hereinafter mentioned. The said party of the second part is to perform and compose the job with such materials as the party of the first part shall provide for the same. The lumber is to be of soft wood.

In consideration whereof, the said Reeder Smith, agent as aforesaid, doth, for himself as agent, and the trustees in trust, and their successors in office, covenant and promise, well and truly to pay to the said party of the second part, executors, administrators, or assigns, the said sum of seven hundred and twenty dollars, in manner following, to wit: One hundred dollars ($100) when the building is raised; one hundred and fifty-nine dollars ($159) when inclosed; one hundred and seventy-one (171) dollars when the job is ready for mason work; and the balance, to wit: the sum of two hundred and ninety (290) dollars in thirty days after the job is completed, and also the said Reeder Smith as agent, or the trustees of said corporation, or their successors in office, shall and will, at their own proper charges and expense, find and provide all the timber, lumber, paints, oils, nails, glass findings, and all other necessary materials to
71 complete the said building, the lumber being of soft wood.

And it is further agreed by the parties that any alteration, addition or diminution, agreed to by the parties may be added to this.

contract without altering its covenants or affecting the fulfilment thereof, any further than the value of those added or diminished; the price of which may be set to this agreement. And to the true and faithful performance of the several articles and agreements aforesaid, each of the said parties bind themselves, their executors, administrators. or assigns, or successors in office, in the penal sum of two hundred dollars, ($200,) firmly by these presents.

In witness we, the parties, hereto have hereunto set our hands and seals, the day and year first above-mentioned.

[SEAL.] REEDER SMITH,
Agent of Lawrence Institute of Wisconsin.

[SEAL.] W. H. McGREGOR.

In presence of—
WM. H. SAMPSON.
S. W. VAN ARMAN.

Exhibit No. 2.

This job is to be finished with 23 feet posts instead of 29, and the work is to be done after the manner described in the within. This contract is so altered that the job is to consist of the finishing of a building with four gables, and finish the attick, and build a good steeple, and the work in the stone basement is to be finished, and all the parts of the building to be completed according to design given by
72 the agent, and is indicated by working plans or drafts drawn in Boston, except the steeple, and also on a board kept in the agent's office, and the same to be performed for the sum of twelve hundred dollars.

Appleton, May 1, 1849.

REEDER SMITH,
Agent of L. University.
W. H. McGREGOR.

Exhibit No. 3.

Articles of agreement made and concluded the twenty-first day of November, one thousand eight hundred and forty-eight, between Amos A. Lawrence, of the city of Boston, in the State of Massachusetts, of one part, and the Lawrence Institute of Wisconsin, of the other part, witnesseth, that the said Amos A. Lawrence, for divers good and valuable considerations, hath covenanted, promised, and agreed, and by these presents doth covenant, promise, and agree to and with the said The Lawrence Institute of Wisconsin, that he will, within twelve months from this date, and as soon as the plat of land hereinafter mentioned shall receive a name duly and legally entered, he will for the consideration of five dollars, and by a proper and lawful deed, grant and convey to the Lawrence Institute of Wisconsin, in fee simple, absolute, all those two certain pieces or
73 parcels of land situate at the Grand Chute, on the Fox river, in the county of Brown, in the State of Wisconsin, being part of sec. twenty-six (26,) in township 21 (twenty-one,) range 17 (seven-

teen) east, surveyed by Mr. Wright, surveyor, and distinguished by the blocks Nos. 1 and 3, (numbers one and three,) on a map by E. C. Cabot, of Boston, now in the possession of the Reverend Reeder Smith, agent of the said institute.

In witness whereof, the said Amos A. Lawrence hath hereunto set his hand and seal at Boston, aforesaid, the day and year first above written.

AMOS A. LAWRENCE. [SEAL.]

Sealed and delivered in the presence of—
MASON C. DARLING.

No acknowledgement.

Recorded in register's office, Outagamie co., June 6, 1851, in vol. 1, of mortgages.

Exhibit No. 4.

Know all men by these presents, that I, Amos A. Lawrence, of Boston, in the county of Suffolk and Commonwealth of Massachusetts' merchant, in consideration of ten dollars to me paid by the board of trustees of Lawrence Institute of Wisconsin, the receipt whereof is hereby acknowledged, and of the covenants contained in a certain bond of even date herewith, sealed and delivered by the
74 said board of trustees to me, the said Lawrence, do hereby grant, bargain, sell, and convey unto the said board of trustees, a certain parcel of land lying in the village of Appleton, in the county of Brown, and State of Wisconsin, being block No. 3, on the plat of said village, surveyed by H. L. Wright, and recorded in the register's office in said county of Brown. To have and to hold the above granted premises, with the privileges and appurtenances thereto belonging, to the said board of trustees, their heirs, successors, and assigns, to their use and behoof forever. And I, the said Lawrence, for myself, my heirs, executors, and administrators, do covenant with the said board of trustees, their heirs, successors, and assigns, that the premises are free from all incumbrances done or suffered by me, and that I will, and my heirs, executors, and administrators shall warrant and defend the same to the said board of trustees, their heirs, successors, and assigns forever, against the lawful claims and demands of all persons claiming by, through, or under me, but against none other.

In witness whereof, I, the said Amos A. Lawrence and Sarah Elizabeth Lawrence, my wife, in token of her relinquishment of dower in the premises, have hereto set our hands and seals this twenty-fifth day of November, in the year of our Lord, one thousand eight hundred and fifty.

AMOS A. LAWRENCE. [SEAL.]
SARAH E. LAWRENCE. [SEAL.]

Signed, sealed, and delivered in the presence of—
F. E. PARKER.
M. E. RICHARDS.

75 COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Be it remembered that on this eleventh day of December, in the year eighteen hundred and fifty, before the subscriber, a commissioner in and for the State of Massachusetts, appointed by the governor of the State of Wisconsin to take acknowledgement and proof of the execution of deeds and other writings, under seal or not, to be used and recorded in said State of Wisconsin, personally appeared Amos A. Lawrence and Sarah, his wife, the persons who executed the within instrument, and acknowledged that they severally executed the said instrument purely for the purpose therein stated. And the said Sarah E., on being made acquainted with the contents thereof by me, and on a private examination apart from her husband, acknowledged that she executed the said instrument freely and without any fear or compulsion of her said husband, or of any other person. And I further certify that I know the persons who made this said acknowledgement to be the identical persons who executed the within instrument.

Given under my hand and official seal.

FRANCIS EDWARD PARKER, *Commis.* [SEAL.]

76 *Exhibit No.* 5.

G. W. Law and wife to A. A. Lawrence:

This indenture, made the third day of August, in the year of our Lord one thousand eight hundred and forty-eight, between George W. Law and his wife, of Brown county, Wisconsin, parties of the first part, and Amos A. Lawrence, of Boston, Massachusetts, of the second part: Witnesseth, that the said parties of the first part give and convey, for the consideration of one dollar, for the benefit of the Lawrence Institute, to his heirs and assigns forever, all that piece or parcel of land, to wit: Beginning at the northwest corner of lot No. (1) one, and the northeast corner of lot No. (2) two, section (26) twenty-six, town (21) twenty-one north, range (17) seventeen east; thence south along the west line of said lot No. one (1) to Fox river; thence along said Fox river far enough, so that by running a line north and parallel with the west line of said lot, No. one, (1,) to the north line of said lot No. one, (1;) and thence to the place of beginning, so that the tract surrounded by said line shall contain thirty-one (31) acres of land. The land hereby intended to be conveyed is thirty-one (31) acres, to be taken on the west side of said lot No. one, (1,) cut off from the east portion of said lot by a north and south line.

The above donation is made on condition that the Lawrence Institute of Wisconsin shall be maintained on section twenty-six,
77 as above described; and in case of failure or removal, the said land shall revert back to said Law, or to his heirs or assigns, together with all and singular the hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, and remainders, rents, issues, and profits, and all the estate, right, title, interest, claim, or demand whatsoever of the said parties of the first part, either in law or equity, as in and to the

above-bargained premises, with the hereditaments and appurtenances. To have and to hold the said premises, as above described, with the appurtenances, unto the said party of the second part, and to his heirs and assigns forever. And the said Geo. W. Law and Catharine, his wife, their heirs, executors, or administrators, do give and convey to the said party of the second part, and to his heirs and assigns, as above described; that at the time of the ensealing and delivery of these presents they are well seized of the premises above conveyed, as of good, sure, perfect, absolute and indefeasible estate of inheritance in the law, in fee simple; and has good right, full power, and lawful authority to convey the same in manner and form as aforesaid, and that the same are free and clear of all incumbrances what kind and nature soever; and that the above premises,
78 in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all and every person or persons lawfully claiming, or to claim, the whole or any part thereof, will forever warrant and defend.

In witness whereof, the said parties of the first part have hereunto set their hands and seals, the day and year above written.

GEO. W. LAW. [SEAL.]
CATH. A. LAW. [SEAL.]

Signed, sealed, and delivered in the presence of—
DAVID P. MEAD,
To the signature of Catharine A. Law and Geo. W. Law.
ALEX. GRIGUM, W. H. SAMPSON,
To the name of Geo. W. Law.
HENRY L. BLOOD.

STATE OF WISCONSIN, *County of Brown, ss:*

Be it known, that on the 5th day of August, A. D. 1848, before me, David P. Mead, justice of the peace in and for said county, personally came the above-named George W. Law and Catharine A., his wife, and acknowledged the above indenture to be their free act and deed for the uses and purposes therein expressed, and desired that the same might be recorded as such, according to law. The said Catharine A. Law, being by me examined separate and apart from her said husband, declared that she did voluntarily, and of her own free will and accord, seal, and her act and deed deliver the said indenture without any coersion or compulsion of her said husband.

79 In testimony whereof, I have hereunto set my hand the day and year above written.

DAVID P. MEAD,
Justice of the Peace.

Rec'd for record Aug. 7th, 1848, 7 a. m.
C. S. WHUBUN, *Reg.*

STATE OF WISCONSIN, *Outagamie County, ss:*

I, P. H. V. Buen, register of deeds, in and for said county, do hereby certify that the foregoing is a correct and true transcript of a deed recorded in vol. 1 of deeds, page 252, of Outagamie county records, and of the whole thereof, and that I have compared the same with the original.

In testimony whereof, I have hereunto set my hand and official seal, this 9th day of December, A. D. 1865.

P. H. V. BUEN, *Reg.* [SEAL.]

[5-cent revenue stamp, cancelled.]

FEBRUARY 12, 1867.

This day came the plaintiff, by his counsel, and filed a bond in the penalty of two hundred and fifty dollars, duly approved by the district judge, for the prosecution of a writ of error to the Supreme Court of the United States, in the words and figures following, to wit:

80 Supreme Court of the United States.

EDWARD L. MEAD
vs.
ANSON BALLARD. } In error.

Know all men by these presents, that we, Edward L. Meade, as principal, and John P. Dousman and Matthew J. Meade, of Brown county, Wisconsin, as sureties, are held and firmly bound unto the above-named Anson Ballard, in the sum of two hundred and fifty dollars, to be paid to the said Anson Ballard, his executors or administrators. To which payment well and truly to be made we bind ourselves, and each of us, jointly and severally, and our, and each of our heirs, executors and administrators, firmly by these presents. Sealed with our seals, and dated this 31st day of January, in the year of our Lord one thousand eight hundred and sixty-seven.

Whereas, the above-named Edward L. Meade hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the circuit court of the United States for the seventh circuit and district of Wisconsin:

Now, therefore, the condition of this obligation is such, that if the above-named Edward L. Mead shall prosecute his said writ of error to effect and answer all damages and costs if he shall fail to
81 make good his plea, then this obligation shall be void; otherwise the same shall remain in full force and virtue.

EDWARD L. MEADE. [SEAL.]
JOHN P. DOUSMAN. [SEAL.]
M. J. MEADE. [SEAL.]

Sealed and delivered in the presence of—
WM. H. NORRIS, JR.

DISTRICT OF WISCONSIN, *County of Brown, ss:*

John P. Dousman and Matthew J. Meade, of said county, being duly and severally solemnly sworn say, and each for himself says, that he is worth the sum of five hundred dollars, exclusive of property exempt from execution and his debts.

M. J. MEADE.
JOHN P. DOUSMAN.

Subscribed and sworn to before me, this 2d day of February, A. D. 1867.

JOHN LAST.
U. S. Circuit Court Comm'r.

Endorsed: Feb'y 12, 1867. This bond approved. A. G. Miller, district judge.

Whereupon a writ of error and citation were duly issued, and copy of writ of error lodged for the defendant.

82 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the judges of the circuit court of the United States of America, for the district of Wisconsin, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said circuit court of the United States of America, for the district of Wisconsin, before you, between Edward L. Mead, plaintiff, and Anson Ballard, defendant, a manifest error hath happened, to the great damage of the said plaintiff, Edward L. Mead, as by the complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf. You are hereby commanded, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, that of right, and according to law and custom of the United States, shall be done.

Witness, the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this twelfth day of February, in the year of our Lord one thousand eight hundred sixty-seven, and of the independence of the United States the ninety-first.

[SEAL.] A. SCOTT SLOAN, *Clerk.*
By JAMES McFARLIN, *Deputy.*

Endorsed: Circuit court of the U. S., district of Wisconsin. Edward L. Mead, *vs.* Anson Ballard. Writ of error.

83 UNITED STATES OF AMERICA, *ss:*

To Anson Ballard, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Wisconsin, in the seventh circuit, wherein Edward L. Mead is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done the parties in that behalf.

Witness, the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this twelfth day of February, in the year of our Lord one thousand eight hundred and sixty-seven, and of the independence of the United States the ninety-first.

A. G. MILLER,
District Judge.

Endorsed: Circuit court of the U. S., district of Wisconsin. Edward L. Mead *vs.* Anson Ballard. Citation. Palmer & Hooker, att'ys for pl'ff. I accept due personal service of the within citation, and acknowledge service of a copy thereof. February 12, 1867. George W. Lakin, def'ts att'y.

84 UNITED STATES OF AMERICA, *District of Wisconsin, ss:*

I, A. Scott Sloan, clerk of the circuit court of the United States of America, for the district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals, and are correct transcripts therefrom, and of the whole thereof now on file, and remaining of record in my office.

In testimony whereof, I have hereunto set my hand and duly affixed the seal of the said court, at the city of Milwaukee, in the said district of Wisconsin, this 16th day of February, in the year of our Lord one thousand eight hundred and sixty-seven, and of the independence of the said United States the ninety-first.

[SEAL.] A. SCOTT SLOAN, *Clerk,*
By JAMES McFARLIN, *Deputy.*

O

United States Supreme Court.

EDWARD L. MEAD,
Plaintiff in Error.

vs.

ANSON BALLARD.
Defendant in Error.

Brief and Points for Plaintiff in Error.

Supreme Court of the U. S.

EDWARD L. MEAD,
Pl'ff. in Error.

vs.

ANSON BALLARD,
Def't in Error.

Brief and Points for Plaintiff in Error.

STATEMENT OF CASE.

This was an action of ejectment brought by the plaintiff in error in the Circuit Court of the United States for the Seventh Circuit and District of Wisconsin, to recover the possession of block No. 13, Appleton plat, in the Second ward of the city of Appleton, Wisconsin. The declaration was in the usual form. Plea the general issue. John F. Mead deceased, the father of the plaintiff in error, acquired title by patent from the Government, dated 24 July 1846, to lots 2 and 3, Sec. 26, Township 21, North of Range 17 East, Green Bay land district, containing 109 18-100 acres. Also by like patent dated December 14, 1846, to the N. E. quarter of the S. W. quarter, Sec. 26, Township 21, N. Range 17 East in the same district, containing 40 acres.

On the 17th of September, 1847, John F. Mead and wife conveyed lots 2 and 3, and the north east quarter of the south-west quarte rof section 26, above described, containing 149 18-100 acres to Amos A. Lawrence, by the deed contained in the record on pages 7 and 8. This deed

contained the following conditions: "Said land being conveyed upon the express understanding and condition that the Lawrence Institute of Wisconsin, chartered by the Legislature of said Territory, shall be permanently located upon said lands, and on failure of such location being made on or before the 7th of September, 1848, and on repayment of the purchase money, without interest, the said land shall revert to and become the property of said grantors, except as aforesaid." Record folio 14, page 8.

John F. Mead died about 1850. Edward L. Mead the plaintiff in error is his son and his sole heir. (Hudd's testimony, page 4, record.)

Block No. 13, described in the declaration is a part of lot No. 2, above described. The defendent was in possession at the commencement of the suit and at the date of the trial below. (Folio 8, record.) On the 19th of December 1865, Thomas R. Hudd as agent of, and by authority of the plaintiff in error, called upon Amos A. Lawrence at Boston, and tendered him repayment of the consideration money mentioned in the deed from John F. Mead to Lawrence, who did not then accept the tender, and an arrangement was made with him by which he could have the money if he desired it. The next day he concluded to accept the tender conditionally, and the money was deposited in Boston where he could get it at any time. (Record pages 24 and 25.)

A location for the Institute was selected August 7th, 1847, on lot 2, sec. 26, and a building was erected. This building was occupied for the purposes of the Institute, or University, (for the name was subsequently changed to The Lawrence University,) until January, 1857, when itwas burned down and has never been rebuilt. On the 3d of August, 1848, Lawrence became the owner of 31 acres in lot 1, sec. 26, by purchase from George W. Law. (See Law's deed p. 36 and 37 of record.) On the 21st of November, 1848, Lawrence entered into a contract with the In-

stitute to convey to it certain lands therein described; (See contract p. 34 and 35 of record) and on the 25th of November, 1850, by deed of that date, conveyed block No. 3 to the Institute. (Record p. 35.) In 1853 the Lawrence University was erected and has since been maintained, not upon the premises conveyed by Mead to Lawrence, but upon the premises conveyed by Law to Lawrence. (Testimony of Smith, record, page 14, Ballard, record, p. 17. Thompson, record, p. 23. Hudd, record, p. 24. Resolution, pages 29, 30 and 31 of the record and map of Appleton, in the original record.)

I.

The conveyance made by John F. Mead to Amos A. Lawrence, dated the 7th of September, 1847, contained two conditions, viz:

1st. That the Lawrence Institute, (now the Lawrence University,) "should be permanently located upon said lands" thereby conveyed, and

2d. That such location should be made on or before the 7th of September, 1848, and provided,

3d. That on a failure to comply with the conditions of the deed, by the grantee, and on repayment of the purchase money without interest, "The said land shall revert to and become the property of the grantors."

See deed, page 7 and 8 of record.

It is necessary to a determination of this case, to give a proper construction to the several conditions contained in the deed in question.

1. It is submitted that the conveyance made by Mead to Lawrence, was made with *conditions subsequent;* and that as a consequence, the estate in the lands described therein, vested in Lawrence, on the execution and delivery of the deed, September 7, 1847, subject to be defeated by the failure or neglect of the grantee to perform the conditions.

The distinction between a condition *precedent* and a condition *subsequent* is very clearly stated by the New York Court of Appeals, in Nicoll vs. The New York & Erie Railroad Co., 2 Kernan 130.

In that case, a conveyance was made to the Hudson and Delaware Railroad Co., "upon the express condition, that the company should construct its railroad within the time prescribed by the act incorporating the same."

The court say: "The Hudson & Delaware Railroad "Company, then by their grant from Dederer, took a "title in fee, but it was a fee upon condition; there being in "the grant, an express condition that the road should be "constructed by the company within the time prescribed "by the act of incorporation."

"This *was not a condition precedent* as was argued by "the plaintiff's counsel; but a *condition subsequent.* The "fee vested at once, subject to being divested on a failure "to perform the condition. This is apparent from the "language employed in the grant and from the character "of the transaction. There are no technical words by "which to distinguish between conditions precedent and "subsequent. Whether a condition be one or the other is "matter of construction, and depends upon the intention "of the party creating the estate. (4 Kent 124; 1 Term "R. 645: 2 Bos. & Pul. 295; 3 Peters U. S. R. 346.) In "the latter case, Marshall, Ch. J., said: If the act (on "which the estate depends) does not necessarily precede "the vesting of the estate; *but may accompany or follow* "*it*, if this is to be collected from the whole instrument, "the condition is subsequent"

"In this case it was evidently the design of the parties that "the estate should vest at once, so that the grantee might "proceed immediately with the construction of the road; "otherwise a condition that it should be completed within "a given time, or ever completed, would be impossible. "From the character of the condition, it could not be a

"condition precedent. Possession and control of the land "must necessarily accompany the construction, and precede "the completion of the road. The grant is not made to "take effect on the happening of a certain event, but, *in* "*presenti* and liable to be divested by the grantee's failure "to perform the condition"

Nichol vs. New York & Erie R. R. Co., 2 Kernan's rep. 121. 130.

The same distinction is taken in Underhill vs. Saratoga and Washington R. R. Co., 20 Barbour 460. *Allen J.* in his opinion says: 'Do the acts required by the condition "in this case, necessarily precede the vesting of the estate. "The grant was 'upon the condition that the parties of "the second part, in the said deed named, should build and "maintain a water tight embankment, or dam, over the "ravine, across the Loughbury Brook, as a part of their "line of road' and, 'that the said embankment or dam, "with the flood-gates and sluice ways therein, might be "used for hydraulic purposes by the said parties of the "first part, their heirs and assigns.' It is pretty clear, "from the phraseology of the condition, that the acts re- "quired, might not only follow the vesting of the estate, "but that they almost necessarily did, or that at all events "it was the evident intention of the parties that the dam "or embankment would involve much time and expense "and *require possession of the land* on the part of the de- "fendants, There was no limit to the time of its perfor- "mance, and consequently the defendants would be allow- "ed a reasonable time to construct and complete the work. "And it was never contemplated that during all the time "necessary for such an act, the defendants should be pre- "vented from taking possession of the land, and delayed "in the construction of the road, which might otherwise "be progressing at the same time that the condition in the "deed was being complied with. I am of opinion there- "fore that the condition was *subsequent* and that the effect

"of the deed was to vest the fee simple of the estate in "the defendants, subject to be defeated by a neglect or re- "fusal to perform the conditions."

Underhill vs. Saratoga & Washington R. R. Co., 20 Barber, Sup. Ct. R. 455.

See also, Finlay vs. King's Lessees, 3 Peters R. 346–374

2 Bos. & Pull. 295. 1 D & E 645.

Parmelee vs. The Oswego & Syracuse R. R. 2 Seldon, 74-80.

Ludlow vs. The N. Y. & Harlem R. R. 12 Barber 440.

Parsons vs. Miller, 15 Wend. 561–564.

Jackson vs. Topping, 1 Wend. 388

Lawrence vs. Gifford, 17 Pickering, 366.

Austin vs. Cambridgeport Parish, 21 Pickering, 218.

Gray vs. Blanchard, 8 Pickering, 283.

Police Jury, vs. Reeves, 9 Martin, 117, (Vol 6, Martin N. S.)

4 Kent, 124, 5 Hammond's Ohio R. 389.

9 East R. 170, 5 Pickering, 528.

Sperry vs. Pond, 5 Ohio, 241.

The conditions in the deed in question were clearly conditions subsequent.

2. The first condition contained in the deed is "That the Lawrence Institute of Wisconsin, chartered by the Legislature of said Territory, shall be *permanently* located upon said lands." It seems to us that the meaning of this clause is entirely clear; that there is no reason to doubt that the grantor intended by the language here used to secure a fixed and continued location of the principal buildings of the Institute upon the lands conveyed. Nor could he have chosen words more apt to express his purpose.—

"Permanently located." "Permanent (L *Permanens Permaneo, Per & Maneo*, to remain, *Lasting*,) continuing in the same state without any change that destroys the form or nature of the thing." "Permanently, with long continuance, durably, in a fixed state or place." Webster.

The grantor then covenanted that the Institute should be located on the lands conveyed, to remain durably, in a fixed place, to continue in the same place without change.

The University was not so located ; a temporary structure was erected in 1848, on block 3, which was on the tract conveyed by Mead, (Smith's testimony, folio 20 of record.) which was burned in January, 1857. (Smith's testimony, folio 21.) The main building or University proper was commenced in 1853, on the Law tract ; (see Smith's testimony, record folio 36. Ballard's, testimony p. 17, folio 33. Hudd's testimony, p. 24, folio 48. Resolutions of the Board of Trustees, on pages 30 and 31 of record ;) and was completed and occupied in 1855, two years before the old building was burned. (Testimony of Ballard, p. 19, folio 36. Thompson, folio 47. Hudd, folio 48.) Not only that, but the block on which the old building was erected, block 3, was sold and conveyed to the defendant. (See deed from Lawrence to Ballard, dated Oct. 28, 1857, folio 42 and 43 of record.) Such an abandonment of the premises conveyed as a site for the University and a "permanent" location of it upon the Law tract was a violation of this condition of the deed with respect to the permanency of the location.

3. This condition required the location of the Institute upon the premises conveyed. It seems evident that the principal building of the Institute was intended. The corporation then known as the "Lawrence Institute of Wisconsin" had been created by the Legislature of the then territory of

Wisconsin, for the purpose of establishing, maintaining and conducting an institution of learning in that then embryo state, for the education of youth generally, and to confer upon those deemed worthy, all such honors and degrees as are usually conferred in colleges and like institutions in the United States. Such an institution must have a local habitation as well as a name. It must have buildings suitable for the business for which it is created. To do what is "usually done in colleges and like institutions in the United States" it requires such buildings as are usually occupied by colleges and like institutions.

It was an object to those owning adjacent lands to secure the location of such an institution in their immediate vicinity, and the benefits which might have been reasonably expected to result from its location would depend largely upon the particular locality selected by the Institute for its main or principal buildings. It was the location of these buildings which was contemplated by the parties to the deed, and intended to be provided for by the condition in the deed under consideration.

This condition is not satisfied by a location upon the Mead tract, of a temporary school; the temporary site of a building thereon for a female boarding house, a Steward's office, the store of the Treasurer, the law office of the Vice President and Auditor, *or* the fence enclosing another tract on which the principal buildings are in fact erected.

Austin vs. Cambridgeport Parish, 21, Pickering 215.

II.

Both the conditions contained in the deed from Mead to Lawrence having been violated, the contingency arose in which the land conveyed "reverted to and became the property of the grantor, on repayment of the purchase money." The plaintiff, the sole heir at law of the grantor having attained his majority, caused the purchase money to

be tendered to Mr. Lawrence, and in a few months afterward brought this action. See testimony of Hudd, p. 24, 25. The interest of John F. Mead in the land conveyed by him to Lawrence is denominated by the statutes of Wisconsin in force at the time of his decease, "An estate in expectancy;" (Revised statutes of Wisconsin 1849, p. 314, chap. 56, sec. 7, 9, and 10;) and this estate descended to his heir. Sec. 35 of chap. 56 of the revised statutes of Wisconsin, of 1849, and which remained in force until 1858, when it was in words re-enacted in the revision of that year, and has ever since remained in force, provides as follows: "Expectant estates are descendable, devisable and alienable in the same manner as estates in possession."

Rev. Stat. of Wis. 1849, p. 316, sec. 35.
Rev. Stat. of Wis. 1858, p. 527, sec. 35.
Jackson vs. Topping, 1 Wend., 388.

III.

It is submitted that the court below erred in the first instruction given to the jury. That instruction is to be found on page 31 of the record and is as follows: "If the Lawrence Institute was located on the land conveyed by Mead and wife to Lawrence on or before the 7th day of September, 1848, and then proceeded to erect a building thereon, which was used by the Institute in its business, and Mead had knowledge of such erection and use, and that the land was being laid out into lots and sold to purchasers, who were improving them, and made no objection during his life time, his heir cannot since his death, claim a forfeiture of the estate against the defendant, a purchaser, of the land in dispute, under said deed from Mead and wife to Lawrence."

1. It is to be remembered that Mead the grantor died in 1850. Up to that time the Institute remained upon the tract conveyed by him. The use made of so much of the

tract as was not required for the University was entirely consistent with the conditions of his deed so long as the University remained upon it. While he lived no attempt was made to change its location. He was not therefore called upon to make any objection to the improvements which were being made upon other portions of the premises. The event had not happened, upon the occurence of which he could claim a forfeiture for conditions broken. His silence during his lifetime has no significance, and does not estop his heir from availing himself of a forfeiture which occurred subsequent to his death. If the location on the Mead tract had been abandoned and the University located upon the Law tract, during his lifetime, and with his knowledge, there might have been more reason for saying that his silence was a waiver of the forfeiture, but in that case it is insisted that his mere silence would not have been a waiver of the conditions in his deed. The Supreme Court of Massachusetts in Gray vs. Blanchard says: "A mere indulgence is never to be construed into a waiver of a breach of condition."

8 Pickering's Rep. 291.

Jackson vs Crysler, 1 Johnson Cases, 125.

In this case the plaintiff granted a tract of land to Hendrick Bronck, upon condition "that the said Hendrick Bronck, his heirs and assigns, should maintain the plaintiff and his wife, in a suitable manner during their natural lives, and should also pay the debts of the plaintiff, in default of which &c." A sale was made of a portion of the premises by H. Bronck to the defendant, for the purpose of enabling him—Bronck, to pay the debts of the plaintiff, who was consulted in regard to the sale, agreed to the propriety of making a sale of a portion of the premises, but objected to the sale of the particular quantity or parcel conveyed to the defendant. The sale was completed. The plaintiff was apprised of it before the execution of the deed,

but did not express any objection to it, but continued to reside with his family on the residue of the tract. The conditions in the deed being afterwards broken, he brought ejectment against the purchaser. The court says: "It does not appear that any fraud or concealment was practiced to entrap the defendant. The rule *caveat emptor*, therefore applies. It was incumbent on the defendant to examine the title. The consent of the lessor if proved, was ineffectual, unless he actually relinquished his right. No parol assent or silent acquiescence can destroy the effect, if a condition contained in a deed. The conditions therefore accompanied the lands in the hands of the defendant, and subjected him to the forfeiture. In some cases, particular acts may waive a forfeiture, by affirming the continuance of an estate after condition broken, but these are acts done by the grantor or lessor, *after a forfeiture accrued and for his benefit.* No parol assent will amount to such a waiver."

IV.

The second instruction "that the tender of the purchase money in the year 1865, by the heir of John F. Mead, this plaintiff, to Lawrence, cannot prejudice the defendant's title under the deed of John F. Mead," (record p. 32, folio 65,) was also erroneous. We have already shown, that Mead's interest in the land after his conveyance, was an "estate in expectancy," and that such estate descended to his heir. It is claimed that the case establishes a breach of the condition after the death of John F. Mead. It was then the prerogative of the plaintiff, to waive the forfeiture or enforce it as he should elect. He elected to enforce it and tendered the purchase money. The tender completed his title to the granted premises, and gave him a clear right to maintain his action of ejectment.

V.

The third instruction is as follows: "If John F. Mead knew of, or advised the deed from Law to Lawrence, for the purposes of the institution, and did not claim a forfeiture of the condition in his deed, his heir cannot claim a forfeiture against the purchasers under his deed to Lawrence, and the subsequent erection of a permanent building for the University on the Law tract, adjoining the Mead tract, worked no forfeiture of the condition in the conveyance of Mead and wife, in favor of the heir of Mead." (Record page 32, folio 55-6.)

1. It is respectfully submitted that this instruction is in direct conflict with the doctrine laid down in Jackson vs. Crysler, 1 Johnson's cases, 125. Gray vs. Blanchard, 8 Pickering 284. See also Jackson vs. Allen, 3 Cow. R. 220, 230, 231.

The conveyance from Law to Lawrence, was not of itself a breach of the condition in Mead's deed. Law's deed did not of itself locate the University upon the lands described in it. Nor was the University so located until after Mead's death. If J. F. Mead did know of the conveyance by Law to Lawrence, he did not know that Lawrence intended to violate one deed in order to comply with the condition of another, and still claim the full benefit of both. His silence at the date of Law's deed and subsequent thereto, was no waiver of the condition in his deed; we have shown that mere silence, or indulgence is not a waiver of a breach of a condition, and much less can mere silence in regard to an *anticipated* future breach of a condition, be construed into a waiver of the breach.

2. If John F. Mead had knowledge of the Law's deed at the time it was executed and "advised" it, it does not follow that he waived any part of the condition in his own deed, or that he anticipated or suspected an intention on the part of Lawrence to violate its terms at some subse-

quent period, for the conveyance by Law to Lawrence was in its terms entirely consistent with a faithful performance of the conditions in his own deed to Lawrence. All there is in the Law's deed, relating to the location of the institute, is contained in the condition therein inserted, as follows: "The above donation is made on condition, that the Lawrence Institute of Wisconsin, shall be maintained on section twenty-six, as above described, and on failure or removal the said land shall revert back to said Law, or to his heirs or asigns." (See the deed, exihbit No. 5, record 36.)

It will be seen that the condition was not, that the Institute should be maintained upon the lands thereby conveyed, but upon section 26, *as above described*. It was necessary, that section 26, should be described in the deed, in order to locate the grant, as every township of six miles square within the State of Wisconsinn, contained a section No. 26. The Section 26, in which the land described in the Law deed were situated, was "above described" as "section (26) twenty-six, town (21) twenty-one north, range (17) seventeen east." The lands conveyed to Lawrence by John F. Mead, were situated in the same section 26, town 21 north, range 17 east. (See Mead's deed, record page 8.)

There was therefore no conflict between the two deeds, but on the contrary, they were entirely consistent with each other, and a compliance with the condition contained in Mead's deed, satisfied the condition contained in the Law deed.

For these reasons the judgment of the court below should be reversed.

H. L. PALMER,
of Counsel for Pl'ff in Error.

SUPREME COURT OF THE UNITED STATES.

No. 229.

EDWARD L. MEAD, PLAINTIFF IN ERROR,

vs.

ANSON BALLARD.

BRIEF, POINTS, AND ARGUMENT FOR DEFENDANT.

GEORGE W. LAKIN,

Attorney for Defendant,

MILWAUKEE, WISCONSIN.

SUPREME COURT OF THE UNITED STATES.

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Attorney for Defendant,

MILWAUKEE, WISCONSIN.

The decision in this case, will substantially, settle the title to about one-half of the city of Appleton.

In the year 1847, (Sept. 7th,) when the Country in that section was a wilderness, and land comparatively valueless, John F. Mead and wife for the consideration of $472.71, conveyed to Amos A. Lawrence lots 2 and 3, and the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of Section 26, Town 21, North of Range 17 East, containing 149 18-100 acres, according to the Government Surveys. The tract was afterwards platted into city blocks and lots. Block 13, for which this suit is brought, is a portion of the land described in the deed from John F. Mead and wife to Lawrence. Said deed bears date, Sept. 7th, 1847 (see folio 14, of printed record,) and is in the usual form of a general warranty deed. Though immediately after the description of the premises conveyed, and before the habendum, these words are inserted, to wit: "Said land "being conveyed upon the express understanding and condition, that "the Lawrence Institute, of Wisconsin, chartered by the Legislature "of said Territory, shall be permanently located upon said lands, and "on failure of such location being made on or before the 7th day of "September, 1848, and on repayment of the purchase money without "interest, the said land shall revert to and become the property of the "said grantors, except as aforesaid."

The plaintiff, who is the sole heir of John F. Mead, the grantor, claims a forfeiture breach, or non-fulfillment of the condition, and

that, by reason thereof, the lands, so conveyed, have reverted to him. The defendant, has occupied the premises described in the declaration for many years as a homestead, and claims to have a good title by purchase from divers parties who derived their title, through and under the deed from John F. Meade, and wife, to Lawrence.

It is sufficient for the defendant to show title out of the plaintiff, without showing it in himself.

I.

The deed of John F. Mead and wife to Amos A. Lawrence, forever, divests the grantors and their heirs of all title to the premises conveyed.

The effect of the deed was to convey a title in fee, absolute and unconditional, and the parties so understood it. The full value, and consideration for the land were paid in money. The location of the Institute on the premises formed no part of the consideration. This is apparent from an inspection of the deed. Besides, after the supposed condition, or reservation of a *reversion*, in case of non-location of the Institute, the grantors in the habendum, forever part with "the reversion, reversions, remainder, remainders, rents, issues and "profits thereof." And then covenant "that the above bargained "premises, in the quiet and peaceable possession of the said party of "the second part his heirs and assigns, against all and every person "or persons lawfully claiming, *or to claim*, the whole or any part "thereof, they will forever warrant and defend." (See printed record, folio 15.

The best evidence, *aliunde*, that the parties understood it to be a deed absolute, is, their giving it that effect by their long acquiescence, without doing or saying anything to the contrary.

II.

The condition in the deed was, and has been performed and fulfilled.

If this proposition is established, it disposes of the plaintiff's claim, as such claim is founded on a supposed breach, or non-performance of the condition.

The thing to be done was to locate the Lawrence Institute, on the tract of land, on, or before the 7th day of September, 1848.

To locate is defined by Webster, "to designate or determine the place of" "as, a committee was appointed to locate a church or court-house." By a reference to the proceedings of the Board of Trustees, (see printed record, folio 17,) it will be seen that a committee was appointed, "with full power to locate the Lawrence Institute, at such "place within the limits of the Charter as they shall deem proper, "and that said committee make report to this board of their doing." This was September 3d, 1847. That committee reported September 7th, 1847.

On the 9th of August, 1848, the committee report "that they have "fixed upon the place on Fox River, called and known by the name "of Grand Chute on Section 26, Town 21, Range 17." (See folio 18,

of printed record,) and by the testimony of Reeder Smith, one of the committee, (see folio 19, of printed record) it is shown that the very spot where the edifice was subsequently erected, was designated and staked out, on the 7th of August, 1848. This was, of course, on the Mead tract. There was no conflict in the testimony introduced by the parties on these points. There was no attempt to controvert these established facts. No instruction or charge from the court was asked for, based upon any theory or intimation to the contrary.

The jury, of course, arrived at their conclusions from the testimony, and, they necessarily found that the location was made within the specified time, and that such location was a "*permanent*" one, that is, that it was made without any design of changing it.

When the defendant purchased the premises in dispute in this case, he opened his eyes and saw that the location had been made, and, of course, saw, that if he purchased he would acquire a good title. It is absurd to suppose that the purchaser was to wait to the end of time, to see if the edifice, then to be erected, survived the elements, before he could know, whether, or not, he had a good title.

As a matter of fact, it is apparent that the condition in the deed was literally fulifilled, and performed, to wit: That the Lawrence Institute was *permanently located*, on the Mead tract, on, or before the 7th day of September, 1848.

The subsequent erection of permanent buildings on the ground so selected by the committee, for the business and educational purposes of the Institute, shows how earnestly and faithfully that condition was fulfilled.

That Mr. Mead, in his lifetime, and his heir after his death, so understood it, is demonstrated from the fact that the first breath to the contrary, is heard after the lapse of 18 years.

Stale demands and claims, in all ages, have been justly regarded with disfavor.

A long time is 18 years, to slumber upon one's rights, and to breathe nothing of title, ownership, remainders or reversions; and that, too, in the 19th century, when the voice of claimants travels on the lightning's wing, across the Continent and around the globe. At such an epoch, ten years are equal to a century of a former period. The labors of Hercules are compassed in a moment, and accomplished at a stroke. At such a time to be silent is to assent, to ratify and to confirm. John F. Mead and his heirs were satisfied. They acknowledged by their long continued silence and acquiescence, that the terms of the grant had been met, and all conditions performed. The voice of a Stentor, personating Mr. Mead, proclaiming ample and complete satisfaction, at noonday, from the steeple of the University edifice, on every day in the year, could not have made the matter more definite, positive, certain and conclusive.

Mr. Mead sleeps on—yet, his star is in the ascendant. Before the fatal bar of twenty years is raised, the somniferous god is dethroned. The plaintiff awakes, and beholds his acres subdivided, and parceled out to people from every quarter of the globe. The tide of immigration is at its flood. Dwellings, churches, school-houses, manufactories

stare him in the face. Genius and progress have out-stripped his imagination. What means it? His oracle answers: It means, a breach of the condition—a forfeiture—a reversion of the title in fee. These towers—these corner lots—these palaces—Appleton—the abode of science—the sanctorum of the gods—(*the labor of fools*)——*Si*——(*Sic volvere Parcas,*) is—OURS.

Shade of Rhadamanthus! What else could it mean?

III.

The end and aim of the grant was effected. The parties were content. And, if there was not a literal performance of the condition, the party who could have claimed a breach of the condition, and the consequent reversion of the premises failed to do so, within a reasonable time, and therefore waived the right. It is now too late to set it up.

It is not unfair to premise that the object of the grant, aside from the actual consideration expressed, were of a two-fold character, to wit: to promote the financial interests of the grantor and his friends; and next, the educational interests of that section of the country. Mr. Mead and his friends had lands to be rendered more valuable by a rapid settlement of the country. They saw that the Institute would give life and vigor to the inhabitants, and would attract thousands to their projected city, and that their lands would increase in value. The precise day of its location was immaterial. The precise spot of the erection of its buildings, was of no moment. The object was to have an institution of learning as soon as practicable, and within a convenient distance, *i. e.* within the projected city of Appleton. Whether the main building should be erected one or two hundred feet, one way or the other, was of no importance. Buildings were erected. Emigration centered there. The land was platted into city blocks and lots, and all improved under the eye of the grantor and his heir. They were proud of it, aye, more, they were made rich, and were satisfied.

Mr. Lawrence, the grantee, by conveyances soon parted with all of his interest in the premises, and they knew it. The deeds were recorded.

It is clear, that if the grantor and his heir, knew, (and it is beyond dispute that they did know) of all this, without dissenting, or making any objection, then they waived any, and all right which they may have had to insist on a forfeiture of the condition in the deed, or a reversion of the land to them.

The purchaser under the deed from Mead to Lawrence may be held to have looked into the said deed and to have taken notice of the condition, and then to have opened his eyes and to have seen, if the Institute had been *permanently* located on the tract. The purchaser could not be held to look beyond the fact of an actual location—certainly not beyond the fact of an actual erection of the Institute. He was not bound to consult the oracles or the gods, and to look through all coming time to ascertain if the elements, legislation, or some decree of fate, or convulsion of nature should extinguish and destroy it.

In Hooper *vs* Cummings, 45, Me., the court say, "If ever there " could be a waiver of a condition evidenced from the conduct of a " party, this would seem to be such a case; certainly, as much so, as " those cases where a person stands silently by and permits property " to be conveyed to which he has a legal claim."

In Willard *vs* Henry, 2, N. H. 120, a non-claim was held to be a waiver of the condition.

Ludlow *vs* N. Y. & H. R. R. Co., 12, Barber Sup., Court Rep. 440. In the last named case, there was a deed of certain premises, dated November 16, 1841, *habendum* to the grantee for the purpose of the extension of the N. Y. & Harlem Railroad, with a condition in these words: "This conveyance to cease and be void, unless the said " Railroad is completed through the above described piece of land, on " or before the 1st day of Jan., 1843." The Company did not complete the road over the premises until September 25th, 1844. The action was commenced October 22, 1846. No attempt was made to enter for condition broken, until September 9, 1846, when the plaintiff demanded possession. The plaintiff saw the improvement going on without objection. The court say: "No stronger evidence could " be exhibited—short of the execution and delivery of a new deed— " of a design to waive the forfeiture, and confirm the grant than the " facts adverted to." That was a case in which the condition was " actually broken; but the court adjudged the forfeiture *waived* by the non-claim of the party.

Chalker *vs* Chalker, 1, Conn. 91, 4, Kent Com., 131.

IV.

The destruction of the main building in 1857, by fire, and its subsequent erection on the Law tract adjoining, and about 200 feet from the Mead tract could not work a forfeiture of the condition, or a reversion of the title to the plaintiff. At any rate such an event could not affect the title of the defendant, who had purchased in good faith, and, who had improved and occupied years before the event happened.

If our position and theory are unsound, Mr. Ballard could never know whether he had a good title. Fortunately, the record in this case shows that the Institution, in its colossal strength and splendor is there, in full operation, where it was originally located.

But, if from some cause, or many causes combined, the University should prove a failure, be utterly destroyed, its charter repealed, or vacated by judicial decision, and the corporation annihilated; what would be the effect on the title to the houses and lots in Appleton? Does any one suppose, that the purchasers in good faith, would loose their homes, by a reversion of the same to the plaintiff?

Mead and Law were brothers-in-law. They had lands and interests in common, and adjoining. They had a common purpose and end, in establishing the University, for their mutual interests, as well as for the interest of the country. It mattered not to them whether the Institute buildings were actually erected on the Mead

tract, or, on the Law tract. The land was there in a body. No reason can be assigned why it could make any difference to Mead, or why it could be prejudicial to his interests to have a part, or the whole of the buildings on the Law tract. Hence the deed from Law to Lawrence, (See folio 76, of printed record,) enjoining upon the grantee to have the Lawrence University maintained on Section 26 (a section being a mile square, and containing 640 acres) in which section are both the Mead and Law tracts. The deed from Law did not require any of the buildings to be erected on the Law tract. It simply aimed at the maintenance of the Institution—somewhere within the compass of a square mile, to wit: on Section 26.

After one of the Institute buildings was destroyed by fire, in 1857, it was re-built about 200 feet over the west line of the Mead tract; and the fence, around the building, enclosed also a portion of the Mead tract, while at the same time some of the buildings of the Institute still remained on the Mead tract. In a word, the Mead and Law tracts were consolidated, and used in common for University purposes, just as Mr. Mead and Mr. Law, in their lifetime intended they should be. That such was their design and intention, the whole history of the times and of that Section of the country, as well as the record prove.

But we are not left without direct, positive, living, affirmative testimony on this point.

It stands and remains uncontradicted and undenied, that the Law tract was obtained by and through the influence and advice of Mr. Mead, for the purposes of the University. (See folio, 58 of record where this is proved by the testimony of Rev. Reeder Smith.)

Were John F. Mead here, he would repudiate the presumption which seeks to contravene his own acts. For, in substance and effect he was an actor in the project of the consolidation of the tracts of land, and in the extension of some of the business and buildings of the Institute to and upon the Law tract.

Originally, the Institute was a small affair. It grew to magnificent proportions, in obedience to the demands of the country. It is unreasonable to suppose, that it must have been limited and confined to its original area, or, that because it has been more successful than its founders anticipated, its end, aim and object have been defeated.

This Law tract having been obtained for University purposes, by the advice and procurement of John F. Mead, his heir is estopped and precluded from taking any advantage in this action, by reason of said tract having been used for the purpose for which he intended it.

V.

The condition in the deed is merely nominal, and the deed is to be construed the same as if the condition were not there.

The instrument is anomalous. Were it designed that the condition should have any effect, it should have occupied a different place.

As it stands, the subsequent clauses and covenants in the deed neutralize and countermand it. The supposed condition is inconsistent with what follows it. It is therefore apparent upon the face of the paper, that no reversion to the grantor, or his heir was ever contemplated. With the parallax of the body corporate afforded by this instrument, in the hands of its projectors, we arrive at the figures, and the fact, that the condition was placed there merely to stimulate the patrons of the Institute to a diligence and munificence in advancing it to the requisite point, and for no other purpose. Revised Stat. of Wisconsin, Chap. 56, page 317, Section 46.

Revised Stat. of Wisconsin, 1858, Chapter 83, page 529, Section 46, reads as follows: "When any conditions annexed to a grant or con-
" veyance of lands are merely nominal, and evinced no intention of
" actual and substantial benefit to the party to whom, or in whose
" favor, they are to be performed, they may be wholly disregarded,
" and a failure to perform the same, shall in no case operate as a for-
" feiture of the lands conveyed subject thereto."

By the deed from Mead to Lawrence, the title passed from Mead and his heirs.

By what means, and by what specific act, has the grantee and his assigns been divested of title? or what has produced a return of the title to the grantor?

John F. Mead had his price for the land, in money. The title to the premises in dispute, in the case at the bar passed through several parties, to the defendant.

All is quiet and satisfactory, until after the lapse of nearly a fifth of a century, when one of another generation rises up and tenders to *Lawrence* the purchase money, without interest! (See testimony of Thos. R. Hudd, folio 49–50, of printed record.)

Here is the fulcrum, and here the lever by which our Archimedes elevates Appleton into his own laboratory!

VI.

The defendant's possession is protected by the Statute, of limitation of ten years.

Stale and obsolete claims are not favored. We have a Statute of limitation, which, we believe puts a quietus on this action. (See revised Statutes 1858, of Wisconsin, Chapter 138, sections 6 and 10, page 819–20.

VII.

Exceptions were taken by the plaintiff to the charge of the court. The court committed no error in its instructions to the jury. The evidence documentary, and parol, adduced at the trial, by the defendant, was uncontradicted. There was no conflict between the testimony produced by the parties litigant on any material point, and, therefore, it would have been competent for the court to have gone further, and

to have instructed the jury, that the evidence did not warrant a verdict for the plaintiff. (Toland *vs* Sprague,12 Pet. 300.)

Such is the law arising from the undisputed facts, as shown by the record.

VIII.

Sound policy forbids the disturbance of ancient titles.

Here in Appleton, families in moderate circumstances, have occupied their lots and homes for more than half of an average life time, having purchased, and believing, with good reasons to believe, that they were the owners. They have paid many times the original value of their premises, in the annual taxes which the Government has imposed. The plaintiff knew, as he was bound to know this, and now springs his snare, and seeks to sweep from them the fruits of their toil. It cannot be done. Law, reason and justice forbid it.

GEORGE W. LAKIN, MILWAUKEE, WIS.

Attorney & of Counsel for Anson Ballard, the Defendant.

(Addenda to Brief and Argument.)

SUPREME COURT OF THE UNITED STATES.

No. 229.

MEAD vs. BALLARD.

The cases cited by the plaintiff on the subject of a waiver of a condition bear no proximate analogy to the case at bar.

Gray vs. Blanchard, 8 Pickering, 284.

In the last named case the deed was artistically drawn ; *habendum*, in fee simple ; "provided however, this conveyance is upon the condi- "tion that no window shall be placed on the north wall of the house "aforesaid, &c., within thirty years from date hereof, &c."

And in in all the subsequent conveyances this condition was referred to and expressly recognized. The thing enjoined was specific as to time nnd place. The Court held it a valid condition. So with Jackson vs Crysler, 1st Johnson's Cases, 125. The conveyance in the last named case was upon condition for the maintainance of B. and his wife during their natural lives. By the terms of the grant a trust was created, and B. and his wife, were the *cestui que trust*. They were entitled to food and raiment, and ample support from and out of the premises granted whenever the grantee failed to furnish such support, and for that purpose the premises were pledged. Any subsequent purchaser, of course, took the premises subject to such pledge. During their natural lives, the premises were answerable for their support. But when their *natural death* occurred, and their bodies were *permanently located*, and their tombstones erected, then a person opening his eyes, and seeing these monuments, could purchase with confidence that the condition was fulfilled. In the case at bar, Mr. Ballard, before he purchased, opened his eyes and saw the monuments that evidenced and demonstrated the performance of the condition in the deed, to-wit, the *permanent location* of the Institute on the designated tract, "*before the 7th day of September*, 1848."

The condition being dictated by the grantor, must be construed most strongly against him. To contrue it to mean, that the University shall be *forever maintained* in successful operation, would be to force a construction beyond the import of the language used by the grantor.

Jackson vs. Allen, 3 Cowen Reports, 220, does not conflict with the defendant's positions This was a case of lease "upon condition that "the lessee shall suffer the lessor to enjoy a way reserved through the "demised premises without obstruction." The condition was broken and the lessor had a right to re-enter.

What real distinction is there between a location and a *permanent* location ?

(Definition of "*Location.*")

1st. "The act of placing or of designating a place."

2d. "The place where something spoken of is located or permanently fixed."—*Webster.*

We insist that the condition was fulfilled, by the act of location, at the specified time. The corporation had a name. The committee gave it a "*local habitation.*" Its agents and employees erected the numerous buildings on the identical premises, which remain the monuments and indexes, not only of its actual permanent location, but of its success. We therefore insist that the condition was not only literally performed, but that the institute has been perpetually maintained, on the identical premises granted. No *one* building can be reasonably construed to be the institute or university. The university is a corporation. Its buildings, the visible monuments of its existence and location, cover a considerable ground, probably more than its founders originally contemplated. The condition, therefore, has been more than performed.

Some allusion has been made to the tender made by the plaintiff after "*having attained his majority*" There is nothing in the record about the plaintiff's majority or minority. He is, therefore, held to the same principles of law that would have governed the case, had his ancestor sued. The eighteen years of slumbering upon his supposed rights, are not to be overlooked.

The law regards all forfeitures and all conditions and restrictions, in restraint of alienation, with dis-favor.

And in further suppport of sub-division III of defendant's argument, and in reply to the position, that there can be no *parol waiver* of a condition in a deed or of a forfeiture under such condition, the following cases are cited :

Sharon Iron Co., vs. City of Erie, 41 Penn. State Reports, (5th Wright) 341,

and the numerous cases therein referred to by the Court.

The Court say, "that the doctrine that a forfeiture may be waived "by the party who has the right to avail himself of the breach of a con- "dition and that he may do this by *acts* as well as by express agree- "ment is a familiar one, and was strongly exemplified in the case of

"Ludlow vs. New York and Harlem Railroad, 12 Barbour, "440."

The Court, in its opinion, starts off with the well-established principle, that "a condition that destroys an estate is to be taken strictly, "and that it is established law that a condition once dispensed with, "in whole or in part, is dispensed with forever, and as to all the land, "for a condition is entire, and cannot be apportioned, except by act of "law." Also see

Paschall vs. Passmore, 15 Penn. State Reports, (3d Harris) 296.

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